

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C.

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In Re: : Docket No.
: 15-CRB-0001-WR
Determination of Royalty : (2016-2020)
Rates and Terms for : Volume 7-PUBLIC
Ephemeral Recording and : Pages 1730-1788
Digital Performance of : Pages 1909-1943
Sound Recordings (Web IV) :
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PUBLIC SESSION

Washington, D.C.
Tuesday, May 5, 2015

The hearing in the above-entitled matter
was convened at 9:00 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

Capital Reporting Company
Day 7 In Re: Determination of Royalty Rates (Public) 05-05-2015

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| 1731 | <p>1 APPEARANCES</p> <p>2</p> <p>3 On behalf of SoundExchange:</p> <p>4 MUNGER TOLLES & OLSON, LLP</p> <p>5 GLENN POMERANTZ, ESQUIRE</p> <p>6 355 South Grand Avenue, 3rd Floor</p> <p>7 Los Angeles, California 90071</p> <p>8 213-683-9107</p> <p>9</p> <p>10 On behalf of Pandora Media, Inc.</p> <p>11 WEIL GOTSHAL & MANGES, LLP</p> <p>12 BRUCE RICH, ESQUIRE</p> <p>13 767 Fifth Avenue</p> <p>14 New York, New York 10153</p> <p>15 212-310-8000</p> <p>16 On behalf of National Association of Broadcasters:</p> <p>17 WILEY REIN, LLP</p> <p>18 BRUCE G. JOSEPH, ESQUIRE</p> <p>19 1776 K Street, N.W.</p> <p>20 Washington, D.C. 20006</p> <p>21 202-719-7453</p> <p>22</p> <p>23 On behalf of iHeartMedia, Inc.</p> <p>24 KELLOGG, HUBER, HANSEN, TODD,</p> <p>25 EVANS & FIGEL, PLLC</p> <p>MARK HANSEN, ESQUIRE</p> <p>1615 M Street, N.W.</p> <p>Suite 400</p> <p>Washington, D.C. 20036</p> <p>202-326-7992</p> <p>On behalf of SiriusXM Radio:</p> <p>AREN'T FOX, LLP</p> <p>PAUL FAKLER, ESQUIRE</p> <p>1675 Broadway</p> <p>New York, New York 10019</p> <p>212-484-3900</p> |
| 1732 | <p>1 APPEARANCES (CONTINUED):</p> <p>2 On behalf of National Public Radio.</p> <p>3 KING & SPALDING, LLP</p> <p>4 KENNETH L. STEINTHAL, ESQUIRE</p> <p>5 101 Second Street</p> <p>6 Suite 2300</p> <p>7 San Francisco, California 94105</p> <p>8 415-318-1211</p> <p>9 On behalf of Intercollegiate Broadcasting and</p> <p>10 Harvard Radio</p> <p>11 WILLIAM MALONE, ESQUIRE</p> <p>12 40 Cobble's Green</p> <p>13 205 Main Street</p> <p>14 New Canaan, Connecticut 06840</p> <p>15 203-966-4770</p> <p>16 On behalf of National Religious Broadcasters :</p> <p>17 WILEY REIN, LLP</p> <p>18 KARYN ABLIN, ESQUIRE</p> <p>19 1776 K Street, N.W.</p> <p>20 Washington, D.C. 20006</p> <p>21 202-719-7008</p> <p>22</p> <p>23 On behalf of Educational Media Foundation:</p> <p>24 DAVID D. OXENFORD, ESQUIRE</p> <p>25 WILKINSON BARKER KNAUER, LLP</p> <p>2300 N Street, N.W.</p> <p>Suite 700</p> <p>Washington, D.C. 20037</p> <p>202-783-4141</p> <p>On behalf of College Broadcasters:</p> <p>CONSTANTINE CANNON</p> <p>DAVID GOLDEN, ESQUIRE</p> <p>1001 Pennsylvania Avenue, N.W.</p> <p>Washington, D.C. 20004</p> <p>202-204-4527</p> |
| 1733 | <p>1 ALSO PRESENT:</p> <p>2 For SoundExchange:</p> <p>3 Kelly Klaus, Melinda LeMoine, Martha</p> <p>4 Larraondo-Klipper, Rose Ehler, Anjan Choudhury,</p> <p>5 Colin Rushing, Jonathan Blavin, Jennifer Bryant,</p> <p>6 Kuruvilla Olas, Rachel June Draper</p> <p>7</p> <p>8 For SiriusXM:</p> <p>9 Jackson Toof, Martin Cunniff, Patrick Donnelly,</p> <p>10 Cynthia Greer</p> <p>11</p> <p>12 For NPR:</p> <p>13 Joseph Wetzel, Ethan Davis, Antonio Lewis, Gregory</p> <p>14 Lewis</p> <p>15</p> <p>16 For Pandora.</p> <p>17 Todd Larson, Christopher Harrison, Benjamin Marks,</p> <p>18 David Yolkut, Elisabeth Sperle</p> <p>19</p> <p>20 For iHeartMedia</p> <p>21 John Thorne, Tres Williams, Rob Wells, Donna</p> <p>22 Schneider, Evan Leo, Kevin Miller, Scott</p> <p>23 Angstreich, Caitlin Hall, Leslie Pope</p> <p>24 For NAB:</p> <p>25 Michael Sturm, Jennifer Elgin, Suzanne Head,</p> <p>Jillian Volkmar</p> <p>Bonnie L. Russo, Capital Reporting Company</p> |
| 1734 | <p>1 CONTENTS</p> <p>2 EXAMINATION OF</p> <p>3 DANIEL RUBINFELD DIR CROSS RED REC</p> <p>4 BY MR. POMERANTZ 1736</p> <p>5 BY MR. RICH 1909</p> <p>6</p> <p>7</p> <p>8 EXHIBITS ADMITTED IN EVIDENCE</p> <p>9 Pandora PAGE</p> <p>10 Exhibit 5345 Letter to Tovsky 1946</p> <p>11 Exhibit 5025 6-22-12 Letter to Tovsky 1954</p> <p>12 Exhibit 5349 White Paper 1963</p> <p>13 SoundExchange</p> <p>14 Exhibit 17 Direct Testimony of 1748</p> <p>15 Daniel Rubinfeld</p> <p>16 Exhibits 41-69 Exhibits and Appendices to 1749</p> <p>17 Direct Testimony</p> <p>18 of Daniel Rubinfeld</p> <p>19 Exhibit 29 Corrected Written Rebuttal 1750</p> <p>20 Testimony of Daniel Rubinfeld</p> <p>21 Exhibits 127-146 Exhibits and Appendices to 1752</p> <p>22 Rebuttal Testimony</p> <p>23 of Daniel Rubinfeld</p> <p>24 Exhibit 2064A Slide Deck 1891</p> <p>25 NAB</p> <p>Exhibit 4129 PowerPoint Slide 1839</p> |

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| <p>1 PROCEEDINGS</p> <p>2</p> <p>3 (PUBLIC SESSION)</p> <p>4</p> <p>5 CHIEF JUDGE BARNETT: Good morning,</p> <p>6 all.</p> <p>7 A bit of a late start because we have</p> <p>8 some Internet problems, and just make sure the</p> <p>9 record is clear, this is a portion of the</p> <p>10 transcript that's not being streamed or real-timed.</p> <p>11 So if anybody is looking for something, you can</p> <p>12 remember which part of the transcript it's in.</p> <p>13 Mr. Pomerantz.</p> <p>14 MR. POMERANTZ: Thank you, Your Honor.</p> <p>15 SoundExchange calls Professor Daniel</p> <p>16 Rubinfeld as our next witness.</p> <p>17 This is a binder of simply his</p> <p>18 testimony on direct and rebuttal.</p> <p>19 CHIEF JUDGE BARNETT: Oh, Doctor,</p> <p>20 before you sit, raise your right hand.</p> <p>21 DANIEL RUBINFELD,</p> <p>22 a witness, called for examination, after having</p> <p>23 been sworn, was examined and testified as follows:</p> <p>24 CHIEF JUDGE BARNETT: Thank you.</p> <p>25 THE WITNESS: You're welcome.</p> | <p>1 school?</p> <p>2 A. Yes. I went on to study at MIT where I</p> <p>3 got a Master's Degree and a Ph.D. in economics.</p> <p>4 Q. And what was the focus of your graduate</p> <p>5 study?</p> <p>6 A. It was, essentially, microeconomics and</p> <p>7 econometrics. I developed an interest in applied</p> <p>8 micro and later went on to study antitrust as a</p> <p>9 specific sub field.</p> <p>10 Q. And just very briefly, what is</p> <p>11 econometrics?</p> <p>12 A. Econometrics is just the application of</p> <p>13 statistical methodology to the study of economics.</p> <p>14 Q. And have you taught econometrics?</p> <p>15 A. Yes. I originally taught econometrics</p> <p>16 in my first job post Ph.D. at the University of</p> <p>17 Michigan until graduating econometrics for several</p> <p>18 years. Later, when I left to move to Berkeley, I</p> <p>19 began to teach some econometrics at an</p> <p>20 undergraduate level where I regularly taught</p> <p>21 courses in quantitative methods and law.</p> <p>22 Q. And how long have you been a professor</p> <p>23 of economics?</p> <p>24 A. Since 1972. So we're talking over</p> <p>25 40 -- 40-some years.</p> |
| 1736 | 1738 |
| <p>1 MR. POMERANTZ: These are slides.</p> <p>2 We're going to walk through them during the course</p> <p>3 of today's examination.</p> <p>4 CHIEF JUDGE BARNETT: Are these part of</p> <p>5 your exhibit?</p> <p>6 MR. POMERANTZ: These are not being</p> <p>7 offered as to evidence. They're just slides to</p> <p>8 help guide us through the examination.</p> <p>9 CHIEF JUDGE BARNETT: Okay.</p> <p>10 DIRECT EXAMINATION BY COUNSEL FOR</p> <p>11 SOUNDEXCHANGE</p> <p>12 BY MR. POMERANTZ:</p> <p>13 Q. Good morning, Professor Rubinfeld.</p> <p>14 A. Good morning, Mr. Pomerantz.</p> <p>15 Q. Who are you currently employed?</p> <p>16 A. I'm currently -- actually, emeritus</p> <p>17 professor at UC Berkeley where I'm the Robert L.</p> <p>18 Bridges Professor of Law and a professor of</p> <p>19 economics, and I'm also still active teaching at</p> <p>20 NYU Law School where I'm a professor of law.</p> <p>21 Q. And let's briefly review your</p> <p>22 educational background. Where did you attend</p> <p>23 college?</p> <p>24 A. I was undergraduate at Princeton</p> <p>25 University where I majored in mathematics.</p> <p>Q. And then you went on to graduate</p> | <p>1 Q. Could you briefly take us through your</p> <p>2 career as a professor of economics, where you</p> <p>3 taught, for what periods of time?</p> <p>4 A. Sure.</p> <p>5 I spent 11 years at the University of</p> <p>6 Michigan. I actually taught before I was finished</p> <p>7 with grad school, but I'll skip that, and spent 11</p> <p>8 years at the University of Michigan in the econ</p> <p>9 department and then later in the law school, and</p> <p>10 then I went on to UC Berkeley where I -- where I've</p> <p>11 been ever since. At the same time, I spent -- and</p> <p>12 I've been affiliated with NYU law school for about</p> <p>13 15 years.</p> <p>14 Q. And UC Berkeley is doing quite proud in</p> <p>15 this proceeding, I take it, with all the economists</p> <p>16 coming from UC Berkeley?</p> <p>17 A. That's right. We're trying to corner</p> <p>18 the market if we can. We like to have people who</p> <p>19 are well trained and have strong opinions.</p> <p>20 Q. Makes us alums from UC Berkeley proud.</p> <p>21 A. Thank you.</p> <p>22 Q. Have you taught or lectured on</p> <p>23 economics at any other university?</p> <p>24 A. Yes. Over the years, I have -- I have</p> <p>25 been a visitor in some form teaching either</p> |

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| 1739 | <p>1 semesters or short courses at a wide range of 2 places. I've spent a semester at Stanford Law 3 School. I -- I -- I taught short course at 4 Virginia Law School, and then I've been overseas 5 quite a bit. I've taught in Norway. I've taught 6 in Portugal, taught in Germany, and I've taught in 7 Switzerland. Switzerland quite regularly. 8 Q. And what courses do you currently 9 teach? 10 A. Right now, I'm -- right now, I'm 11 getting set to teach this fall at NYU where I'll be 12 teaching a course in antitrust law and economics 13 and I'll also be teaching a course in quantitative 14 methods in law. 15 Q. Are you a lawyer? 16 A. No, I'm not. I -- my wife is a lawyer. 17 and I decided that that's -- in my family, that's 18 women's work. So I -- but I've been teaching law 19 for a long time. I feel quite comfortable teaching 20 antitrust law. 21 Q. And have you been involved in any 22 seminars for judges relating to economics and 23 statistics? 24 A. Yes, I have a long affiliation with the 25 Federal Judicial Center, which is the</p> | 1741 |
| 1740 | <p>1 administrative arm of the Federal Courts, and so 2 every couple of years I have -- for the last 20, 25 3 years, I've given some short lectures on statistics 4 in law, and then three times over the years I've 5 organized intensive three-day sessions with Federal 6 District Court and the public judges, just focused 7 on -- on statistical methods in law. The last one, 8 I think, was about a year-and-a-half ago. 9 Q. Does your teaching and research 10 experience include the use of surveys? 11 A. Yes. A lot of my early work, 12 professional work as an economist involved 13 developing and using surveys to understand public 14 opinion about public goods, publicly-provided 15 goods, regulation. And when, in fact, I was at the 16 University of Michigan, I was appointed as a -- as 17 a faculty member of the survey research center 18 there and I still have an affiliation with them. 19 Since that time, I have continued to 20 teach one or two classes in my quantitative methods 21 courses about survey methodology. 22 Q. Does your experience include the use of 23 conjoint analysis? 24 A. Yes, it does. I -- I've -- I teach a 25 bit about conjoint and I've actually conducted two</p> | 1742 |
| | <p>1 conjoint analysis over the years. One -- one is an 2 expert in a copyright case fought in the late 1980s 3 between Apple and Microsoft over the value of the 4 Windows graphical user interface, and then when I 5 was at the Department of Justice, we actually 6 brought a case, U.S. versus Dentsply, when I was a 7 chief economist and we actually, really, at my 8 urging, developed a conjoint analysis which was 9 utilized in that case. 10 Q. Does your experience include the use of 11 hedonic regression analysis? 12 A. Yes. I've written a number of articles 13 about hedonic analysis. It's the statistical 14 methodology for -- for figuring out the value of 15 different features of -- of a -- of a product, and 16 I've written a number of articles of that subject. 17 In fact, my article on the use of hedonics in the 18 environmental area is the most widely cited 19 empirical piece on evaluation of -- of 20 environmental goods, cleaning up the environment. 21 Q. Have you written any books on 22 economics? 23 A. Yes. I have two -- I've written quite 24 a few books, but many of them were edited. The two 25 I've written, I co-authored, are textbooks starting</p> | |

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| 1743 | <p>1 economist at the antitrust division of the Justice 2 Department do? 3 A. Well, the chief economist is 4 responsible for really helping put together cases 5 and then making decisions about whether to file or 6 not to file cases or to work out some kind of 7 settlement. In -- really, all cases that are -- 8 that are civil and in some cases, I would say rare 9 cases, to be involved in the criminal activities of 10 the antitrust division, and those of us who have 11 been there have the advantage of having a staff of 12 over 50 Ph.D. economists plus a number of other 13 people who are well trained in finance to help us 14 do our work. 15 Q. And it's fair to say that you and 16 Professor Shapiro and Professor Katz all have 17 served in that same position as chief economist at 18 the Justice Department? 19 A. Yes, we have. We're all very proud 20 that UC Berkeley has had a chance to offer that 21 kind of public service. 22 Q. And I take it as chief economist in the 23 antitrust division, were you asked to provide 24 advice on a wide range of industries? 25 A. Yes.</p> | 1745 |
| 1744 | <p>1 Q. And can you just give some examples of 2 the industries that you addressed while you were 3 there at the Justice Department? 4 A. It was very wide. The most famous case 5 I worked on had to do with -- had to do with 6 computer operating systems and software, but I was 7 also involved in the airline industry very 8 extensively. We were involved with credit cards. 9 It was very important credit card case that was 10 tried at the time. A lot of extraction industries, 11 banking, really about half of the industries 12 might -- one might imagine, work industry is 13 obviously involved in the other half or that had 14 the responsibility to the Federal Trade Commission. 15 Q. And can you give an example of a 16 couple, two or three of the cases that you worked 17 on while you were at the Justice Department that 18 were at least publicly known? 19 A. Yes. So I -- I mentioned this case, 20 U.S. versus Microsoft, which was a Section 2 21 Sherman Act claim that Microsoft had attempted to 22 monopolize the market for -- for operating systems 23 for desktop computers, and that was a very 24 successful case from the government's point of 25 view. Government brought a case against Visa and</p> | 1746 |

1 Mastercard arguing that their complex collaboration
2 had antitrust aspects to it. I happened to be
3 involved in blocking a merger to large defense
4 companies where we found a witness who was able to
5 -- who happened to be the Secretary of Defense who
6 thought that this merger was going to be harmful to
7 the U.S. Security. So I was covering a wide range
8 of industries. Did a number of deals in the radio
9 industry which has some relevance here.
10 Q. And have you done -- other than the
11 work you've already described for the government,
12 have you done other work for the government in any
13 capacity during your time as an economist?
14 A. Yes, I have been an expert for the U.S.
15 Government, DOJ, also the Federal Trade Commission
16 on quite a few cases. I guess most recently, a
17 year ago, I was the government's expert for the
18 examination of the AT&T mobile merger. It's a
19 government blocked. I've also worked for various
20 state attorney's general, on their cases. I have
21 consulted with the European Union Directorate. I
22 actually wrote some of their software they use for
23 analyzing mergers. And, on occasions, I've
24 actually advised other government enforcement
25 agencies, as well.

1 Q. I have you been qualified as an expert
2 witness in other cases?
3 A. Yes, I have.
4 Q. And do you have any experience that's
5 specific to the music business?
6 A. Yes, I do. I mentioned when I was at
7 government we did look at a number of radio mergers
8 that were going on at the time. I believe at least
9 one or two which involved Clear Channel at the
10 time. I have spent some time, not very successful,
11 but some time taking a look at the ASCAP BMI
12 consent decree and seeing whether we might -- might
13 range and negotiate to modify that decree. It
14 didn't happen, although it has happened since I've
15 left.
16 Outside of the government, I consulted
17 along with you and Universal Music in its
18 acquisition of EMI. I had also did a prior
19 acquisition involving Univision and I would say
20 since that time I have continued to monitor the
21 industry pretty closely.
22 MR. POMERANTZ: Your Honor, I tender
23 Professor Rubinfeld as an expert in microeconomics,
24 econometrics, and antitrust economics?
25 MR. RICH: No objection.

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| 1747 | <p>1 CHIEF JUDGE BARNETT: Professor</p> <p>2 Rubinfeld is thus qualified.</p> <p>3 MR. POMERANTZ: Thank you, Your Honor.</p> <p>4 BY MR. POMERANTZ:</p> <p>5 Q. Professor Rubinfeld, could you pick up</p> <p>6 the binder that I have in front of you that says,</p> <p>7 "Daniel Rubinfeld's Direct Examination," and if you</p> <p>8 could turn to behind Tab 1, and could you identify</p> <p>9 this document for the judges?</p> <p>10 A. Yes. Tab 1 is the corrected testimony</p> <p>11 that I gave in this proceeding.</p> <p>12 Q. All right. And I think Tabs 2 through</p> <p>13 30 are various exhibits and appendices to your</p> <p>14 direct testimony, correct?</p> <p>15 A. That's correct.</p> <p>16 MR. POMERANTZ: They each have</p> <p>17 different exhibit numbers. Your Honor, I'm trying</p> <p>18 to figure out how to admit them. So I -- Your</p> <p>19 Honor, we would move to admit SoundExchange Exhibit</p> <p>20 17, which is the corrected testimony -- direct</p> <p>21 testimony of Professor Rubinfeld. I will take it</p> <p>22 one at a time. Let me start with that.</p> <p>23 MR. RICH: No objection.</p> <p>24 CHIEF JUDGE BARNETT: Hearing no</p> <p>25 objection, Exhibit 17 is admitted.</p> | 1749 | <p>1 we'll withdraw that objection.</p> <p>2 CHIEF JUDGE BARNETT: Thank you.</p> <p>3 So SoundExchange Exhibit 41 through 69</p> <p>4 -- I'm sorry.</p> <p>5 MR. POMERANTZ: 69, yes.</p> <p>6 CHIEF JUDGE BARNETT: Are admitted.</p> <p>7 And, in the notebook, just so everybody is on the</p> <p>8 same page, they are behind Tabs 2 through 30,</p> <p>9 inclusive.</p> <p>10 (SoundExchange Exhibit Nos. 41 through</p> <p>11 69 were admitted into evidence.)</p> <p>12 MR. POMERANTZ: Thank you.</p> <p>13 CHIEF JUDGE BARNETT: Thank you.</p> <p>14 BY MR. POMERANTZ:</p> <p>15 Q. Professor Rubinfeld, if you could turn</p> <p>16 to behind Tab 31, and I identify for me that</p> <p>17 document which is marked as SoundExchange Exhibit</p> <p>18 29.</p> <p>19 A. That is the corrected written rebuttal</p> <p>20 testimony that I gave in this proceeding.</p> <p>21 Q. And is this a true and correct copy of</p> <p>22 that testimony, as far as you know?</p> <p>23 A. Yes.</p> <p>24 MR. POMERANTZ: So, Your Honor, this</p> <p>25 one is a little tricky. So we want to move into</p> |
| 1748 | <p>1 (SoundExchange Exhibit No. 17 was</p> <p>2 admitted into evidence.)</p> <p>3 MR. POMERANTZ: All right. Then the</p> <p>4 appendices and exhibits look like they go from</p> <p>5 Exhibit 41 through 69, and I don't know if there's</p> <p>6 any objections. Let me try to put them all</p> <p>7 together.</p> <p>8 I'd also move into evidence</p> <p>9 SoundExchange Exhibits 41 through 69.</p> <p>10 MR. RICH: Your Honor, on Pandora's</p> <p>11 behalf, we have objections to Exhibits 47, 48 and</p> <p>12 49 on the basis that they constitute hearsay.</p> <p>13 MR. POMERANTZ: Your Honor, he's an</p> <p>14 expert witness. Expert witnesses are entitled to</p> <p>15 rely upon hearsay, and this is what he's relying</p> <p>16 upon in support of his testimony.</p> <p>17 MR. RICH: The objection goes to the</p> <p>18 truth of the contents. We have no objection to his</p> <p>19 relying on anything he would like. The objection</p> <p>20 goes to the adoption of the truth of the contents</p> <p>21 of those exhibits.</p> <p>22 MR. POMERANTZ: We'd simply be offering</p> <p>23 them for purposes of Dr. Rubinfeld's reliance on</p> <p>24 this information.</p> <p>25 MR. RICH: Based on that stipulation,</p> | 1750 | <p>1 evidence SoundExchange Exhibit 29. We are only,</p> <p>2 during this examination, going to be discussing</p> <p>3 Section 3(E) and Appendix 2, which is the appendix</p> <p>4 that addresses the Apple agreements. And the</p> <p>5 remaining content of this will be discussed during</p> <p>6 Professor Rubinfeld's rebuttal testimony. I think</p> <p>7 our request -- I don't know if it's easiest for</p> <p>8 the -- for you, is that we admit it now entirely</p> <p>9 provisional on their objections when he comes back</p> <p>10 on rebuttal, whichever way Your Honor wants to</p> <p>11 proceed is fine.</p> <p>12 MR. RICH: For Pandora, we would have</p> <p>13 no objection to that.</p> <p>14 CHIEF JUDGE BARNETT: Thank you.</p> <p>15 Exhibit 29 is admitted for all</p> <p>16 purposes, although on your representation, Mr.</p> <p>17 Pomerantz, the only portions that will be inquired</p> <p>18 upon are Section 3(E) and the Apple agreements.</p> <p>19 (SoundExchange Exhibit No. 29 was</p> <p>20 admitted into evidence.)</p> <p>21 MR. POMERANTZ: During this phase.</p> <p>22 CHIEF JUDGE BARNETT: During this</p> <p>23 phase.</p> <p>24 MR. POMERANTZ: Correct.</p> <p>25 BY MR. POMERANTZ:</p> |

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| 1751 | <p>1 Q. And then, Professor Rubinfeld, the</p> <p>2 remaining tabs here which are Exhibits 127 through</p> <p>3 146, those are the exhibits and appendices to your</p> <p>4 rebuttal testimony, correct?</p> <p>5 A. Yes.</p> <p>6 MR. POMERANTZ: Your Honor, we would</p> <p>7 offer them on the same condition. To the extent</p> <p>8 that any of them relate to Section 3(E) or Appendix</p> <p>9 2, we would be potentially questioning Professor</p> <p>10 Rubinfeld about those now. The remaining ones, we</p> <p>11 will be questioning him during the rebuttal phase.</p> <p>12 MR. RICH: Based on that set of</p> <p>13 representations, Pandora has no objection.</p> <p>14 MR. HANSEN: Your Honor, those are all</p> <p>15 exhibits that relate to things he's not going to be</p> <p>16 covering in his direct testimony, that I think he,</p> <p>17 ultimately, will cover. But I just want to be</p> <p>18 clear that we're not going to be -- we reserve our</p> <p>19 objections to that phase and they shouldn't be</p> <p>20 admitted now.</p> <p>21 CHIEF JUDGE BARNETT: Thank you, Mr.</p> <p>22 Hansen.</p> <p>23 I was just going to say, we will admit</p> <p>24 these now but without prejudice to the licensee</p> <p>25 services raising objections during rebuttal, if</p> | 1753 | <p>1 many of the materials that were submitted that</p> <p>2 related to my aspects of the case as possible.</p> <p>3 Q. And when you say that you've read the</p> <p>4 prior proceedings, you mean that you read the</p> <p>5 decisions of -- of the CRB and those --</p> <p>6 A. Yes. Not the actual hearings of the</p> <p>7 proceedings, but just the opinions, that's correct.</p> <p>8 Q. And have you used or subscribed to any</p> <p>9 of the streaming services that have been discussed</p> <p>10 in the various papers filed in this matter?</p> <p>11 A. Yes, to various degrees, I have -- I</p> <p>12 have used, and to some extent, experimented with</p> <p>13 services such as Pandora's, Spotify, iTunes, Rdio.</p> <p>14 Q. Approximately, how many --</p> <p>15 JUDGE STRICKLER: Excuse me one second.</p> <p>16 Sir, when you say, "iTunes," are you</p> <p>17 referring to downloads or radio?</p> <p>18 THE WITNESS: I was actually referring</p> <p>19 to radio. I believe I -- my recollection is I did</p> <p>20 one download just to, you know, see that I can do</p> <p>21 it because I had a new Smartphone; but, primarily,</p> <p>22 I was relying on the radio service.</p> <p>23 BY MR. POMERANTZ:</p> <p>24 Q. Approximately, how many agreements did</p> <p>25 you look at in connection with your direct</p> |
| 1752 | <p>1 there are appropriate objections to be raised at</p> <p>2 that time.</p> <p>3 MR. POMERANTZ: Certainly.</p> <p>4 And I would just note that behind Tab</p> <p>5 33, Exhibit 128, that is the Appendix 2 that</p> <p>6 addresses the Apple agreements.</p> <p>7 CHIEF JUDGE BARNETT: And so that we're</p> <p>8 all, again, behind the same tabs, 127 through 146</p> <p>9 are admitted and they are behind Tabs 32 through</p> <p>10 51, inclusive.</p> <p>11 (SoundExchange Exhibit Nos. 127 through</p> <p>12 146 were admitted into evidence.)</p> <p>13 BY MR. POMERANTZ:</p> <p>14 Q. Professor Rubinfeld, what did you do to</p> <p>15 prepare for your work on this matter?</p> <p>16 A. Well, I worked for well over a year</p> <p>17 with various staff to -- to look at quite a few</p> <p>18 contracts that were entered into by the parties</p> <p>19 involved in this industry. I have read extensive</p> <p>20 documents that are both public and documents</p> <p>21 provided in this case. I have studied the</p> <p>22 performance data provided by the parties and</p> <p>23 submissions to this case. I have read all the</p> <p>24 prior web proceedings, including the SDARS</p> <p>25 proceedings and tried to familiarize myself with as</p> | 1754 | <p>1 testimony in this matter?</p> <p>2 A. My recollection is I looked at 88</p> <p>3 agreements and then a whole series of amendments to</p> <p>4 those agreements. I don't know what the total</p> <p>5 would amount to.</p> <p>6 Q. All right. So let's turn to your</p> <p>7 binder of slides, and if we could turn to Slide 1.</p> <p>8 MR. POMERANTZ: And, Your Honor, just</p> <p>9 so that you know, some of these slides do contain</p> <p>10 confidential information as we go through them.</p> <p>11 I'm not probably going to put them up on the screen</p> <p>12 because each of you have them, but if there's</p> <p>13 anything you want on the screen we can put them</p> <p>14 there. I'm going to go for a little while in open</p> <p>15 court and public, and then I'm going to have to</p> <p>16 move into the restricted.</p> <p>17 CHIEF JUDGE BARNETT: Thank you.</p> <p>18 BY MR. POMERANTZ:</p> <p>19 Q. Professor Rubinfeld, could you describe</p> <p>20 what's on Slide 1?</p> <p>21 A. Yes. Slide 1 simply lists the types of</p> <p>22 agreements that I am expecting to testify about</p> <p>23 today. So it includes the interactive service</p> <p>24 agreements, the non-interactive service agreements,</p> <p>25 and, in particular, I'll be talking about several</p> |

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| 1755 | <p>1 of the Apple agreements and the iHeart/Warner 2 agreements. And then there would be what we have 3 been calling, the Section 3(E) licenses, which 4 includes four separate agreements, which I will 5 elaborate on later. 6 Q. All right. So this is the subject of 7 what we're going to be covering in your direct 8 examination today, correct? 9 A. Yes. 10 Q. And then based on your analysis of -- 11 of agreements, did you determine proposed rates for 12 commercial Webcasters for the years 2016 through 13 2020? 14 A. I did. 15 Q. And if you could turn to Slide 2, and 16 is this your rate proposal? 17 A. Primarily, I -- for Commercial 18 Broadcast Society, I proposed three elements. The 19 first element would be a minimum rate of \$500 per 20 service, and then I also offer on top of that a 21 greater-of alternative which would be greater of a 22 per-play rate and a greater of a percentage of 23 revenue, and the exhibit or the demonstrative you 24 have in front of you describes the per-play rates 25 as they increase from year to year over the five</p> | 1757 | <p>1 hand, the percentage of revenue component ensures 2 that there -- that both the services and the labels 3 will share if the service happens to be successful. 4 My view is that there are -- there are aspects of 5 innovation and progress to be made both on the side 6 of the services and the labels for a successful 7 service, and that the best most efficient way to 8 award the parties and incentivize both sets of 9 parties is to allow a greater-of structure. So if 10 the revenues go higher because songs are being 11 listened to and streamed on the larger scale, I 12 believe it's appropriate for both parties to be 13 made better off and that greater-of structure 14 achieves that goal. 15 JUDGE STRICKLER: Excuse me. 16 Professor, you explained just now the economic 17 efficiencies of this particular structure. 18 Was that the primary basis for your 19 determination, to use a greater-of structure, or 20 was it the fact that you saw the greater-of 21 structure predominating as a revealed preference in 22 the -- in your benchmark mark? 23 THE WITNESS: I would -- I would say 24 it's probably the efficiency aspect of the story 25 that won it over for me, but if I had not seen any</p> |
| 1756 | <p>1 years that will be covered by the decision of this 2 board, and it also describes a constant percentage 3 of revenue. 4 Q. All right. If you could turn to Slide 5 3 and explain to the panel why you chose a 6 greater-of structure. 7 A. Well, they're really two reasons why I 8 went in that direction. First is that when I 9 looked at many of the contracts that I studied, the 10 contracts between the services and the labels, 11 those contracts do have greater-of structures. So 12 it's clear that -- to me, that the parties, when 13 negotiating the contracts, had an interest in 14 having this greater-of structure. And the second 15 thing was that I believed in studying the 16 underlying economics of these structures that there 17 were real important economic efficiencies to be 18 gained by having such a structure, and the 19 efficiencies arise because of the combination of 20 the two alternatives. 21 The per-play rate guarantees that when 22 there are songs being spun or played, that there 23 will be some minimum compensation, even though a 24 service might be new and not generating new 25 revenues or any significant revenues. On the other</p> | 1758 | <p>1 of these agreements privately, I would wonder 2 whether I had missed something. But I think the 3 economic -- underlying economics is more important 4 to me because there are -- there are differences 5 between the private agreements and any rule that 6 you would make if you chose to offer greater-of 7 structure because the structure you would pick, if 8 you chose one, would, obviously, apply to everyone 9 on the same basis. 10 So one has to be a little careful when 11 one goes from looking at private agreements to 12 looking at what the CRB decides to do. So I 13 actually did rely quite heavily on my thinking 14 about the economics, and so the importance of -- of 15 rewarding both sides here through this greater-of 16 structure was quite important to me. 17 JUDGE STRICKLER: Thank you. 18 BY MR. POMERANTZ: 19 Q. In the absence of a percentage of 20 revenue prong, would the per-play rate that you 21 were proposing would that be higher? 22 A. Yes, it would almost certainly be 23 higher. 24 Q. Why? 25 A. Well, we -- for one thing, we know in</p> |

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| 1759 | <p>1 practice that from the experience in looking at the 2 performance that the per-play minimum is not -- is 3 often not the prong that is chosen. So, as a 4 practical matter, under the actual contracts, often 5 the other prongs -- the prongs in the contracts, 6 other than the per-play minimum, get utilized. 7 There's often a subscriber minimum and often 8 there's a greater-of structure. 9 So the reward -- if we used a per-play 10 minimum, the rewards to the labels, I think, would 11 be too low and I -- we would need to incentivize 12 the labels and to reward the artists we would have 13 to find a higher level. It's not obvious to me 14 exactly what the best alternative appropriate rule 15 would be, but it would certainly be one that was 16 higher than the per-play minimum. 17 Q. All right. Let's turn to some of the 18 developments that have occurred in the streaming 19 marketplace in the last few years. 20 You mentioned that you had been 21 studying the streaming marketplace, correct? 22 A. Yes. 23 Q. If you could turn to Slide 4. 24 JUDGE STRICKLER: If you're going to 25 change slides, if we can just stay on this slide</p> | 1761 | <p>1 independent economic basis for increasing the 2 per-play rate every year separate and apart from 3 seeing it, once again, if you will, revealed 4 preference in your benchmark market? 5 THE WITNESS: If you're asking me 6 whether there's some theoretical reason why we 7 would expect prices just to go up, I would say no. 8 I think it has to be based in an -- on an empirical 9 judgment and -- I mean, it might also be driven 10 partly by inflation, but, right now, my friends at 11 the feds suggest we're not going to see much of 12 that. So -- so no, I don't -- I think economic 13 theory would not tell you that prices -- that rates 14 should go up. I think it would have to be based on 15 empirical judgment where we think rates are likely 16 to be going for competing products. 17 JUDGE STRICKLER: And was that 18 empirical judgment done to increase the rates, or 19 you based it solely on what you saw in the 20 benchmark interactive market, the fact that they 21 may increase? 22 THE WITNESS: Well, it's -- it's based 23 on what I've seen in the market in terms of pricing 24 and looking at, as I mentioned, this one other 25 contract.</p> |
| 1760 | <p>1 for just a moment? 2 MR. POMERANTZ: Absolutely. 3 JUDGE STRICKLER: Professor, I'm sure 4 you would likely to go into this in greater detail 5 in your testimony with regard to the granular 6 nature of the particular rates that you proposed 7 here, but just for purposes of this demonstrative, 8 you show an increase from year to year, linear 9 increase. 10 Why do you show an increase in the 11 per-play rate? 12 THE WITNESS: The increase is actually 13 a little bit less than \$0.01 every year, and I will 14 explain that later, but it -- I believe that 15 it's -- it's an appropriate response, partly, to be 16 consistent with increases I've seen in the 17 non-interactive subscription prices and also in an 18 increase that's proposed in the iHeart/Warner deal, 19 which is actually greater-of and I have seen some 20 private evidence that the parties want and expect 21 an increase. 22 JUDGE STRICKLER: And separate and 23 apart from seeing it in the benchmarks that you've 24 been looking at, it sort of relates back to my 25 previous -- to your previous answer, is there an</p> | 1762 | <p>1 JUDGE STRICKLER: And were you able to 2 discern an economic reason why in the interactive 3 market the rate increased from year to year? 4 THE WITNESS: Well, I -- yes, I think 5 that this is something I will also be talking 6 about. I think probably the primary reason I see 7 is that it has to do with a convergence between the 8 non-interactive and interactive markets. 9 JUDGE STRICKLER: You mention that in 10 your testimony? 11 THE WITNESS: Right. 12 So, as you know, the subscription 13 prices to interact the services are, I think, 14 probably -- tend to be quite a bit higher than for 15 non-interactive services, and I believe that 16 there's been substantial convergence, and part of 17 that convergence has led to some increases in the 18 subscription prices for the non-interactive 19 services, whose products, by the way, have been 20 improving over time. And so when you sort of put 21 that all together and look at the combination of 22 both sets of services, you focus on the 23 noninteractive services which are the ones that are 24 directly at issue in determining the statutory 25 rates. You see pressure for prices going up in the</p> |

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| 1763 | <p>1 past, and I think -- my understanding from the</p> <p>2 study I've have done is that I think those</p> <p>3 pressures, if you will, will continue in the</p> <p>4 future.</p> <p>5 JUDGE STRICKLER:</p> <p>6 Q. So is it your testimony, then, that the</p> <p>7 convergence creates a situation where the rate</p> <p>8 needs to increase to offset the lost opportunity to</p> <p>9 have sales in the interactive market, given the</p> <p>10 fact that convergence is causing a migration into</p> <p>11 the noninteractive market?</p> <p>12 THE WITNESS: I think that's a fair</p> <p>13 description, yes. I think that's part of the</p> <p>14 story, yes.</p> <p>15 JUDGE STRICKLER: That said, why does</p> <p>16 that not also affect the percent of revenue prong</p> <p>17 of your greater-of formula?</p> <p>18 THE WITNESS: You know, it might. It</p> <p>19 might be that the percentage of revenue prongs</p> <p>20 should also increase slightly over time, but I</p> <p>21 didn't feel like I had enough evidence upon which</p> <p>22 to go into that kind of detail and make that kind</p> <p>23 of judgment. So I took what I saw as a more</p> <p>24 conservative route and I just kept the rate the</p> <p>25 same.</p> | 1765 |
| 1764 | <p>1 But what you will see later in my</p> <p>2 testimony is that the rates, the percentage of</p> <p>3 revenue does vary from contract to contract both in</p> <p>4 the contract and also what happens varies a lot in</p> <p>5 terms of what happens ex post, and I just didn't</p> <p>6 see enough of a pattern to -- over time to make me</p> <p>7 feel comfortable changing that rate.</p> <p>8 JUDGE STRICKLER: Thank you.</p> <p>9 BY MR. POMERANTZ:</p> <p>10 Q. So we're moving to Slide 4, Professor</p> <p>11 Rubinfeld, and we were going to discuss</p> <p>12 developments you've seen in the streaming music</p> <p>13 market.</p> <p>14 Can you first discuss what you have</p> <p>15 seen with respect to the access model?</p> <p>16 A. Sure.</p> <p>17 Basically, we have seen over a</p> <p>18 substantial period of time a change in technology</p> <p>19 with the move to mobile and the technology that's</p> <p>20 improved -- broadband technology. And along with</p> <p>21 that has come to move from people actually being</p> <p>22 consumers of music in the sense of actually owning</p> <p>23 the music, either buying a CD or doing a download.</p> <p>24 And what's happened over time is that consumers now</p> <p>25 use what I would call an access model where they --</p> | 1766 |
| | <p>1 they're beginning to rely much more heavily on</p> <p>2 streaming and moving away from actually paying for</p> <p>3 the ownership of songs, and that access model has</p> <p>4 started. You know, I think you will see, in an</p> <p>5 exhibit, started years ago and is continuing and</p> <p>6 the expectation of almost everyone in the industry</p> <p>7 that I read about is that that model will continue</p> <p>8 to grow.</p> <p>9 Q. All right. If you turn to Slide 5,</p> <p>10 which is a slide that the judges have seen earlier</p> <p>11 in this proceeding, and just, if you could, briefly</p> <p>12 explain what this shows with respect to the access</p> <p>13 model.</p> <p>14 A. Sure.</p> <p>15 Actually, we saw a lot of versions of</p> <p>16 this in the discussion yesterday. So what I was</p> <p>17 focusing on primarily was the red part of the</p> <p>18 color, which starts, as you can see, around 2005,</p> <p>19 where streaming is beginning to show up to be at</p> <p>20 least a significant meaningful portion of the total</p> <p>21 revenue, and that red part is continually growing.</p> <p>22 So there's no doubt from the -- from the diagram,</p> <p>23 and I don't think there's much disagreement that</p> <p>24 streaming has become more and more important over</p> <p>25 the last decade and the expectation is that that</p> | |
| | <p>1 will continue to grow. And, at some point,</p> <p>2 streaming will probably become the single largest</p> <p>3 source of music revenue. And these are -- these</p> <p>4 are revenues that cover the kinds of services we're</p> <p>5 talking about. These do not include revenues from</p> <p>6 live concerts and things of that kind.</p> <p>7 JUDGE STRICKLER: Now -- I'm sorry. I</p> <p>8 didn't mean to cut you off.</p> <p>9 Please go ahead.</p> <p>10 THE WITNESS: I was just going to say,</p> <p>11 we also see it's a little less clear, but you can</p> <p>12 start to see some decline in music downloads. I</p> <p>13 think if we include the 2014, the pattern would be</p> <p>14 clearer. Those are -- that's the light green</p> <p>15 color. It's growing at some point and it actually,</p> <p>16 in the last couple of years, has kind of</p> <p>17 stabilized, and then actually does decline as you</p> <p>18 go into 2014.</p> <p>19 And, overall, as I think we discussed</p> <p>20 yesterday, revenue from music as a whole, of all</p> <p>21 the sources we have, including CDs and downloads</p> <p>22 and LPs, has been declining substantially for quite</p> <p>23 a bit -- quite a period of time. So this is an</p> <p>24 industry which -- which overall has faced some</p> <p>25 significant changes and both -- in my view, both</p> | |

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| 1767 | <p>1 the services and the record companies are both 2 looking to be innovative in finding new ways to 3 continue to grow this industry in the face of the 4 fact that individuals are more interested in this 5 access model than they are in the consumption 6 model.</p> <p>7 JUDGE STRICKLER: You just mentioned 8 access model, and I actually wanted you to flip 9 back for a moment just to Demonstrative 4, Slide 4. 10 You had testified, and as others have testified, 11 that there's a different type of consumer behavior 12 now consumers have gravitated towards an access 13 model rather than a purchase model.</p> <p>14 As an economist, are you informed by 15 different theories of access pricing compared to 16 typical pricing in a purchasing sale context?</p> <p>17 THE WITNESS: Well, we do -- I mean, as 18 economists, we do have a number of pricing models 19 which might apply. So yes, I mean, those are 20 things we think about. So you can think -- with 21 access you can think about various two-part tariff 22 models, for example, where you charge a fee to get 23 access and then a -- maybe made, possibly, a 24 substantial fee, and then a smaller fee every time 25 you actually listen to the music, and that -- and</p> | 1769 | <p>1 pricing, which is driven and written that 2 extensively. The problem with Ramsey-type pricing 3 is that you need quite a bit of information and -- 4 because you need to clearly delineate these 5 different groups of consumers, and the extent, in 6 which case, Ramsey pricing has certain deficiency 7 properties, but if you can't delineate or separate 8 these different groups of consumers, then it's a 9 model which may be very difficult to apply.</p> <p>10 JUDGE STRICKLER: In one of your 11 answers to one of my previous questions you mention 12 the concept of -- or agreed that the concept of 13 opportunity costs was relevant in looking at the 14 interactive versus the non-interactive market.</p> <p>15 Does the concept of opportunity cost 16 arise in economists' models of an access pricing in 17 the field of regulation?</p> <p>18 THE WITNESS: Yes, I think it would 19 come up because you're -- you're always asking -- 20 it comes up at several levels. When you're asking, 21 for example, what kind of inference can you draw 22 from a contract that is reached, you always have to 23 ask what the opportunity cost is for the two 24 parties who are entering into the contract. 25 What -- what are the other choices they have when</p> |
| 1768 | <p>1 that's something I think I will talk about briefly 2 later, or you could charge a single fee to just be 3 a member of a group, which would give you access 4 for free, or you can just charge marginally where 5 you charge for each song you stream.</p> <p>6 So there are a whole range of -- from a 7 pricing models, that may come to you.</p> <p>8 JUDGE STRICKLER: Are there access 9 pricing models that apply with particularity to an 10 economist in the field of regulating prices?</p> <p>11 THE WITNESS: Well, if we're speaking 12 generally and not just about music.</p> <p>13 JUDGE STRICKLER: Yeah.</p> <p>14 THE WITNESS: Well, one naturally 15 thinks about the extent to which their -- the 16 demands for the various services vary in terms of 17 elasticity, and so you -- it's natural to think 18 of -- I think you mentioned this, perhaps, earlier 19 in the proceeding, I guess, but it's natural to 20 think about setting higher prices for products or 21 services that have more inelastic demand and lower 22 prices for products that have more elastic demand.</p> <p>23 JUDGE STRICKLER: Would that be Ramsey 24 pricing?</p> <p>25 THE WITNESS: That's exactly Ramsey</p> | 1770 | <p>1 they chose to enter into this particular contract? 2 And that might -- that question might reveal 3 something about their willingness to pay, which is 4 part of what, I think, the judges are interested 5 in. You're interested in trying to decide what's 6 an appropriate rate.</p> <p>7 So yes, I think opportunity cost is 8 important, but it's often very difficult because it 9 often points you to something you may not have 10 direct information about. You know what people 11 agree to and you know what the rates are, but you 12 may not so easily know what the opportunity cost 13 is.</p> <p>14 JUDGE STRICKLER: And opportunity cost 15 in this context would also apply to a willingness 16 to accept, as well, right, with regard to -- in 17 this case, with the regard to say the record 18 companies, what they would be willing to accept is, 19 in part, dependent upon the opportunity cost they 20 perceive by accepting a particular transaction for 21 the service?</p> <p>22 THE WITNESS: I'm sorry to interrupt.</p> <p>23 Yes, I agree totally with that. I 24 think it applies equally to both sides of the 25 bargaining, that's right.</p> |

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| 1771 | <p>1 JUDGE STRICKLER: Thank you.</p> <p>2 BY MR. POMERANTZ:</p> <p>3 Q. If we could turn to Slide 6, and this</p> <p>4 is the second development that you mentioned with</p> <p>5 respect to the streaming industry. You mentioned</p> <p>6 this previously today.</p> <p>7 Could you just briefly describe what</p> <p>8 you're talking about when you say "convergence"?</p> <p>9 A. Yes. I am focusing -- focusing on the</p> <p>10 fact that, over time, some of the distinctions</p> <p>11 between the so-called interactive, on-demand</p> <p>12 services, and the non-interactive statutory</p> <p>13 services have changed, and part of that change has</p> <p>14 arisen as consumers have become more comfortable</p> <p>15 with and utilized mobile -- mobile services, rather</p> <p>16 than desktop services. And part of it, I think,</p> <p>17 has been in response to the -- to both the</p> <p>18 providers of both of those kinds of services to</p> <p>19 improve their services and to broaden the</p> <p>20 offerings.</p> <p>21 So, nowadays, if you're providing a --</p> <p>22 many providers, I would say, of on-demand services</p> <p>23 do offer playlists of consumers that you can create</p> <p>24 -- you can curate and create your own playlist and</p> <p>25 you can see the playlist with your own offer --</p> | 1773 | <p>1 2011, has it now offered some less than on-demand</p> <p>2 offerings in addition to its on-demand service?</p> <p>3 A. Yes, it has. I mean, the last time I</p> <p>4 went to Spotify was just a couple of days ago.</p> <p>5 They actually offered to me a set of playlists that</p> <p>6 I could choose that they could be leaned back. I</p> <p>7 could just click and they would basically start</p> <p>8 running through their playlist for me. So I did</p> <p>9 not have to do my own curation.</p> <p>10 Q. And has Spotify added a radio service</p> <p>11 that's similar to Pandora's?</p> <p>12 A. Yes, but they do have a free radio</p> <p>13 service which does have a lot of similarities, as</p> <p>14 I've suggested.</p> <p>15 Q. And are you familiar with Spotify's</p> <p>16 shuffle service?</p> <p>17 A. Yes. That's the mobile service which</p> <p>18 does -- does allow you to, you know, create a</p> <p>19 playlist and it will, as you suggested, shuffle</p> <p>20 among the playlist.</p> <p>21 Q. So not quite on-demand, but more so</p> <p>22 than a regular radio service?</p> <p>23 MR. RICH: Objection. Leading.</p> <p>24 MR. POMERANTZ: I'll withdraw it.</p> <p>25 CHIEF JUDGE BARNETT: Thank you.</p> |
| 1772 | <p>1 with your own artists, but you also have the</p> <p>2 ability to just accept a playlist as put forward by</p> <p>3 that service.</p> <p>4 And if you switch over and talk about</p> <p>5 the non-interactive services, like Pandora, which</p> <p>6 have, you know, very successful methods of people</p> <p>7 modifying their own stations so that they can</p> <p>8 create stations that they like, Pandora does also</p> <p>9 offer the possibility to have some ability -- some</p> <p>10 ability and limited ability to see those stations</p> <p>11 with artists that they like.</p> <p>12 So the -- the offerings of the two</p> <p>13 types of services aren't identical. There still</p> <p>14 are important differences. But my belief is they</p> <p>15 have converged over time. So playlists, on the one</p> <p>16 hand, for the interactive services, and stations,</p> <p>17 on the other hand, for the non-interactive</p> <p>18 services, to some extent are beginning to look more</p> <p>19 similar.</p> <p>20 Q. And before we get to the playlists,</p> <p>21 let's take a service like Spotify. When it entered</p> <p>22 the U.S. market in 2011, it had an on-demand</p> <p>23 service offer, correct?</p> <p>24 A. Yes.</p> <p>25 Q. And since it -- after it entered in</p> | 1774 | <p>1 BY MR. POMERANTZ:</p> <p>2 Q. If you turn to Slide 7, and if you</p> <p>3 could explain to the judges what this slide is</p> <p>4 reflecting?</p> <p>5 A. Yes, this was -- I put this together as</p> <p>6 just an illustration of why things look similar.</p> <p>7 although there are some differences. So if I had</p> <p>8 more time I would have actually curated each of</p> <p>9 these lists and I didn't do that. I just put</p> <p>10 together a sketch. So I have an example of some</p> <p>11 playlists which would be provided by Spotify. So I</p> <p>12 happen to be a classical music fan. So one of them</p> <p>13 might be a curated set of pieces by Bach. Some</p> <p>14 might also be a curated set of classical pieces</p> <p>15 more broadly defined, and then it might have others</p> <p>16 which is a mix of songs like that that I might like</p> <p>17 to play if I'm working.</p> <p>18 So the -- again, the working playlist</p> <p>19 would be one I definitely curated, but the best of</p> <p>20 Bach and the classical elements would be a curated</p> <p>21 list done by Spotify. So I have the choice of</p> <p>22 doing both depending on how much I want to take</p> <p>23 advantage of the on-demand service.</p> <p>24 Now, if you go over to Pandora, Pandora</p> <p>25 does allow me, through its algorithm, to create my</p> |

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| 1775 | <p>1 own radio stations. It also will provide many 2 radio situations where I don't have to do any work 3 at all. So I actually have a -- play Pandora a 4 fair amount, so I actually -- and I'm a Billy Joel 5 fan, so I actually do have a Billy Joel radio 6 station of my own. I haven't taken the time to 7 create Dan's working station because I've been too 8 busy working on this case, and I'm a tennis fan, so 9 I might imagine, eventually, trying to put together 10 a tennis station, which I could, but that would 11 take some work on my part to try to encourage 12 Pandora, through its algorithm, to give me a tennis 13 station. 14 So, again, the stations in Pandora can 15 be ones where I have had very little input or if I 16 make more use of their algorithm I can have a lot 17 of input and shake the nature of the station. 18 Q. All right. And if you could turn to 19 Slide 8, Professor Rubinfeld, you've determined a 20 benchmark for the hypothetical market for 21 non-interactive streaming services, correct? 22 A. Yes. 23 Q. What have you assumed regarding this 24 hypothetical marketplace? 25 A. Well, first and importantly, I</p> | 1777 | <p>1 MR. POMERANTZ: Your Honor, the premise 2 of the entire benchmark analysis is to take the 3 interactive service agreements and compare it to a 4 hypothetical market. He's simply explaining the 5 hypothetical market that he was -- 6 JUDGE STRICKLER: If I may? 7 Thank you. 8 The objection was that he -- he's 9 mentioned that in his analysis he talked about 10 making sure the market was competitive and the 11 objection is that nowhere in the written direct 12 testimony does he cite that his analysis reflects a 13 competitive market. So it would seem to me the 14 easiest way to resolve this would be to just point 15 out where in his written direct testimony he makes 16 reference to the -- the fact that his analysis 17 reflects a competitive market, and then we would 18 have a specific response to the specific objection. 19 MR. POMERANTZ: I was not trying to 20 elicit the testimony of a competitive market. I'm 21 simply trying to get the testimony about actual 22 buyers and actual sellers. I believe the ground 23 rules here -- he did not address this particular 24 competitive issue in his direct testimony, but I -- 25 as I understand the ground rules here, if one of</p> |
| 1776 | <p>1 understand that it was appropriate to assume that 2 there is no statutory license and that the 3 negotiation in place should be one between a 4 willing buyer and a willing seller. I have also -- 5 understand that I should take the market otherwise 6 as it exists. So I should look at the actual 7 buyers who are in the market, the actual sellers 8 who are in the market. My understanding is that 9 the exercise does not imagine creating a totally 10 different market as long as the market is 11 competitive, and so that means that -- that means 12 that I don't need to go back and look at a total 13 different construction of the market. I can look 14 at the actual buyers in the past and the actual 15 sellers in the past and go from there. 16 CHIEF JUDGE BARNETT: Mr. Rich? 17 MR. RICH: Objection. This is a 18 created extension of this witness's direct 19 testimony where he talked not at all about taking 20 the market as one finds it. Never used the word 21 "competitive," which he just laced into his 22 testimony as an undergirding premise of his direct 23 testimony. Move to strike that answer. 24 CHIEF JUDGE BARNETT: Want to respond, 25 Mr. Pomerantz?</p> | 1778 | <p>1 their experts rebutted his testimony saying, for 2 example, it wasn't effectively competitive, this is 3 the time to respond, and as long as it's no -- no 4 new data or no new analysis, we are entitled to 5 respond to what their experts have said on 6 rebuttal. And so we would expect that without any 7 data or analysis, this is exactly rule -- the issue 8 we discussed with Professor McFadden. 9 JUDGE STRICKLER: Maybe I'm missing the 10 ground rules or I'm misunderstanding, but I 11 thought, with regard to rebuttal, we were only 12 talking about the Apple major licenses and the 3(E) 13 licenses and not getting into further rebuttal. Am 14 I correct on that? 15 MR. POMERANTZ: It's a little 16 different. So the -- I'll take Mr. Rich's client. 17 Pandora has offered Professor Rubinfeld's -- I'm 18 sorry -- Professor Shapiro's testimony in rebuttal 19 to Professor Rubinfeld's direct testimony, and in 20 his rebuttal testimony -- 21 JUDGE STRICKLER: You're now talking 22 about Professor Shapiro? 23 MR. POMERANTZ: Correct. 24 In Professor Shapiro's rebuttal 25 testimony, he says that Professor Rubinfeld made a</p> |

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| 1779 | <p>1 mistake by not looking at whether the underlying -- 2 the interactive service market is effectively 3 competitive. This is the time, under the ground 4 rules, for Professor Rubinfeld to respond to that. 5 And as long as he does so without any new data or 6 new analysis, this is the time to respond to it 7 because it was raised in rebuttal to his direct 8 testimony. 9 JUDGE STRICKLER: Mr. Rich, you're not 10 disputing that Professor Rubinfeld makes mention of 11 the competitiveness issue in his rebuttal 12 testimony? 13 MR. RICH: No, I am not. 14 JUDGE STRICKLER: So it's a ground 15 rules question you really have? 16 MR. RICH: It's slightly more than 17 that, Your Honor. It's a presentation question. 18 While I'll certainly delve into this extensively in 19 my cross-examination, the purport of the question 20 was: What did you affirmatively have as your 21 assumed fact as you went into this? 22 And I think the clear inference was: 23 What did you walk into your assignment, meaning 24 when you created the interactive benchmark? 25 And the last three sentences of the</p> | 1781 | <p>1 JUDGE STRICKLER: I don't think the 2 problem is so much with your question. It's that 3 the answer became a bit of a narrative and the 4 objection was to the narrative that when -- that 5 was responded to your question. 6 MR. POMERANTZ: And I -- again, I 7 was -- that wasn't where I was going with the 8 question, and I -- 9 CHIEF JUDGE BARNETT: That's fine. 10 The objection is sustained. We will 11 just disregard those parts of the answer that went 12 beyond those necessary to answer the question. 13 MR. POMERANTZ: Thank you. 14 CHIEF JUDGE BARNETT: And now let's 15 proceed. 16 BY MR. POMERANTZ: 17 Q. And so in your hypothetical market, you 18 assumed, for example, that Pandora was one of the 19 buyers, correct? 20 A. Yes. 21 Q. And iHeart would be a buyer, correct? 22 A. Yes. 23 Q. And you assumed that Universal and Sony 24 and Warner would be among the sellers, correct? 25 A. Yes, that's correct.</p> |
| 1780 | <p>1 witness's answer. and I'm sorry we don't have 2 Livenote, basically created a set of assumptions 3 which maybe they were in the witness's head, but 4 they were nowhere expressed in his direct 5 testimony. 6 If Mr. Pomerantz wants to elicit the 7 fact from this witness that he never did expressly 8 identify any of those factors, but failing to have 9 done so, how does he respond to the criticism that 10 he failed to do so, I suppose if we're going to get 11 issued joinder to some of Professor Shapiro's 12 testimony, that would be acceptable; but, 13 otherwise, we're going to have a deeply erroneous 14 record here and a conflation very importantly, I 15 might add, of what his operative assumptions were, 16 in fact, when he developed his benchmark as opposed 17 to rationales for supporting it following the 18 benefit of reading rebuttal testimony. 19 JUDGE STRICKLER: Okay. 20 MR. POMERANTZ: Again, I don't agree 21 with the characterization of what Mr. Rich said. 22 But at the end of the day, all I was wanting to get 23 a list here was who did you think the actual buyers 24 and sellers are. I wasn't getting into anything 25 about competition at that point.</p> | 1782 | <p>1 Q. As well as the independent labels like 2 Beggars and Secretly Canadian, and others, correct? 3 A. That's correct. 4 Q. Now, you testified that the interactive 5 service agreements served as the basis for your 6 rate proposal, correct? 7 A. I did. 8 Q. All right. Could you turn to Slide 9 9 and just briefly explain this roadmap for today's 10 discussion with the judges? 11 A. Yes. My plan, as I testified further 12 today, is to explain why I began my focus of my 13 analysis on interactive agreements. Then I will go 14 ahead to explain later why I thought there were 15 adjustments that needed to be made to those 16 interactive agreements to -- to lead to a proposal 17 I was comfortable with. And then I'll talk about 18 some of the criticisms of the use of an interactive 19 benchmark that have been made in the past and by 20 others. 21 Q. All right. So let's start with the 22 first point, which is why interactive agreements 23 form the basis of your rate proposal. If you could 24 turn to Slide 10 and walk the judges through your 25 reasons?</p> |

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| 1783 | <p>1 A. Yes.</p> <p>2 Slides 10 and 11 have an outline of</p> <p>3 four of the reasons why I focused initially on</p> <p>4 interactive agreements. And the first is that I</p> <p>5 was looking for as broad a base of evidence as</p> <p>6 possible and I would describe the evidence I had</p> <p>7 for interactive agreements as thick. We sometimes</p> <p>8 distinguish in economics between thick markets and</p> <p>9 thin markets. Here, I was focusing on the number</p> <p>10 of agreements I had information about, and as I</p> <p>11 mentioned earlier, I had many, many agreements that</p> <p>12 describe interactive space and so I -- it made me</p> <p>13 more comfortable relying on averages and things</p> <p>14 like that when I had a broader set of agreements.</p> <p>15 And those agreements included all the</p> <p>16 major labels and the number of important indies,</p> <p>17 including, I mentioned, Beggars Group, which is the</p> <p>18 largest indie. It was one of the indies I looked</p> <p>19 at extensively. And so it avoids the problem that</p> <p>20 if you look at a single deal or a single contract,</p> <p>21 it's always possible that that deal is somewhat sui</p> <p>22 generis, but that would not be typical of all the</p> <p>23 deals you would see. So when I was working with</p> <p>24 means, working with averages over a large number of</p> <p>25 deals is statistically more preferable. That was</p> | 1785 | <p>1 negotiation that we're all looking for here.</p> <p>2 Then the question became -- I'm now on</p> <p>3 Slide 11. Then the question became if you're going</p> <p>4 to focus on the interactive agreements, how do you</p> <p>5 handle the fact that they are -- there are</p> <p>6 on-demand services that have -- that provide</p> <p>7 different functionality and different benefits to</p> <p>8 users than typically the non-interactive services</p> <p>9 do, and so I needed to make adjustments to account</p> <p>10 for that.</p> <p>11 And, finally, I -- of course, I ask</p> <p>12 myself what's different between today and 2009 when</p> <p>13 the CRB last considered this issue and felt that --</p> <p>14 reasonably uncomfortable with looking at the -- at</p> <p>15 the interactive services, and my conclusion was</p> <p>16 that a lot has changed, and particularly there's</p> <p>17 been substantial conversion and competition between</p> <p>18 the two services, and this leads me to feel much</p> <p>19 more comfortable relying on the interactive</p> <p>20 services as the starting point for doing my</p> <p>21 analysis that lead to the rate proposal I described</p> <p>22 earlier.</p> <p>23 Q. All right. So, Professor Rubinfeld,</p> <p>24 now I would like to move to actually how you</p> <p>25 went -- how you went ahead and did your analysis</p> |
| 1784 | <p>1 my first reason.</p> <p>2 My second reason is that to be</p> <p>3 consistent with the goals of the CRB, I wanted to</p> <p>4 look for deals that were not -- not as effective by</p> <p>5 the shadow as might otherwise be. My view is that</p> <p>6 any deals that have been reached in -- in the world</p> <p>7 where we do have statutory licenses are probably</p> <p>8 affected to some extent by the shadow of the</p> <p>9 existing statutory rates, but the degree of that</p> <p>10 shadow, the importance of the shadow would vary.</p> <p>11 And as you move from the non-interactive agreements</p> <p>12 to the interactive agreements, the shadow, in my</p> <p>13 view, becomes less significant. So it was natural</p> <p>14 to look in that direction.</p> <p>15 So what it means is that even though --</p> <p>16 if you're in the non-interactive space, of course,</p> <p>17 the statutory license is not an option directly</p> <p>18 unless you were to change the service. So the --</p> <p>19 so the threat of -- what we call the threat points</p> <p>20 in the negotiation, the willingness to pay, the</p> <p>21 willingness to accept are less affected, in my</p> <p>22 view, by the shadow, and so I just think what --</p> <p>23 you're more likely to get information that will</p> <p>24 help inform what would happen if there were willing</p> <p>25 buyers and willing sellers in a hypothetical</p> | 1786 | <p>1 and calculations and adjustments.</p> <p>2 So if we turn from Slide 12 to Slide</p> <p>3 13, does Slide 13 represent the steps that you</p> <p>4 undertook to actually calculate a proposed rate</p> <p>5 based on the interactive benchmarks?</p> <p>6 A. Yes, it does. I'm not going to go</p> <p>7 through them right now. I think I will go through</p> <p>8 them individually, but this slide does list all the</p> <p>9 steps.</p> <p>10 Q. All right. So we're going to go</p> <p>11 through each of these steps briefly just so that</p> <p>12 Your Honors understand the methodology. And we'll</p> <p>13 start with Step 1, which states -- starts with --</p> <p>14 start with interactive services stated minimum</p> <p>15 per-play rates and determine average minimum</p> <p>16 per-play rate.</p> <p>17 Could you explain what you were doing</p> <p>18 there and if it -- and if you could take us through</p> <p>19 Step 1?</p> <p>20 A. Sure.</p> <p>21 Many of the agreements do have minimum</p> <p>22 per-play rates, and that would be -- that would</p> <p>23 serve to set the floor for the possible</p> <p>24 arrangements I was going to pick and I was looking</p> <p>25 for -- I was looking for, at this point, a</p> |

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| <p>1 greater-of formula which would include a percentage 2 of revenue, and if you're going to have a 3 percentage of revenue I was looking for a floor 4 that would -- that would have a per-play rate that 5 would apply broadly to all the statutory services. 6 JUDGE STRICKLER: If I may, I apologize 7 for interrupting you, sir. 8 You say that many of the agreements you 9 looked at have minimum per-play rates. Were those 10 minimum per-play rates -- were those contracts 11 contracts other than contracts with greater-of 12 formulas, or you mean that was part and parcel of 13 the greater-of formula? 14 THE WITNESS: In most cases, it was 15 part and parcel of a greater-of formula. I can't 16 recall -- there may have been one or two that just 17 had a minimum per-play rate, but almost all had 18 other prongs. 19 JUDGE STRICKLER: Thank you. 20 BY MR. POMERANTZ: 21 Q. And maybe I should take this a slide at 22 a time because I think we're almost getting into 23 restricted information. 24 So, could you turn to Slide 15 and just 25 explain what this slide reflects?</p> | <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> |
| 1788 | 1909 |
| <p>1 A. This slide actually lists all of the 2 contracts I looked at. So it lists the services 3 and then the -- under each service, the labels that 4 had contracts with those services. So with -- you 5 can see it's just a wide range of services and 6 includes labels that include all the majors and 7 also a number of the important independents. So 8 you can see Beggars Group listed quite a bit. You 9 also see Merlin, which we've talked about earlier 10 in the proceeding which is a combination of a 11 variety of independents, and you see all the 12 majors. 13 MR. POMERANTZ: All right. So I think 14 what we should do, if I may request, if we can go 15 into restricted session because the next slide has 16 some confidential information. 17 CHIEF JUDGE BARNETT: Okay. Anyone in 18 the courtroom who has not signed a nondisclosure 19 agreement or -- yes, nondisclosure agreement under 20 the protective order, if you would please wait 21 outside until we complete this session. 22 (THIS ENDS PUBLIC SESSION) 23 (RESTRICTED SESSION BOUND SEPARATELY) 24 25</p> | <p>1 (THIS BEGINS PUBLIC SESSION) 2 CHIEF JUDGE BARNETT: Mr. Rich. 3 MR. RICH: Thank you, Your Honor. 4 May I impose upon you yet another 5 binder, please, which is our cross-examination? 6 CHIEF JUDGE BARNETT: We've noticed. 7 Thank you. 8 MR. RICH: Those have been distributed. 9 Thank you very much. And I believe the 10 witness has one. 11 CROSS-EXAMINATION BY COUNSEL FOR NAB 12 BY MR. RICH: 13 Q. Good afternoon, Professor. 14 JUDGE STRICKLER: Excuse me, before you 15 begin -- 16 CHIEF JUDGE BARNETT: Oh, there it is. 17 JUDGE STRICKLER: And yet, I did. 18 BY MR. RICH: 19 Q. Nice to see you again, Professor. 20 A. Same here. 21 Q. Now, at the time you prepared your 22 written direct testimony in this case, you were 23 aware of the CRB's Web III remand termination; is 24 that correct? 25 A. Yes.</p> |

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| <p>1 Q. I believe you testified a bit earlier 2 today in response to question posed by Mr. 3 Pomerantz that you, in fact, had read that decision 4 prior to submitting your direct testimony, correct? 5 A. Yes. 6 Q. And that determination was just a 7 little over a year ago, is that consistent with 8 your recollection? 9 A. The remand decision, yes. 10 Q. And, I take it, you read it with care? 11 A. Yes. 12 Q. And, in fact, you professed to adopt 13 what you termed "the analytical framework" for 14 evaluating potential rate setting benchmarks as set 15 forth in that determination, correct? 16 That's at 121 and 122 of your direct 17 testimony, Paragraphs 121, 122. So feel free to 18 refresh yourself. 19 A. That's what I'm doing. 20 Q. I think it's the third -- pardon me, 21 it's the -- 22 A. I have it. 23 Q. -- fourth tab, yes. 24 If you have trouble locating, we'll 25 give you some page references.</p> | <p>1 A. That's part of it, yes. 2 Q. The same parties test? 3 A. Yes. 4 Q. The statutory license test? 5 A. Yes. 6 Q. And the same rights test? 7 A. Yes. 8 Q. Okay. Now, this hypothetical 9 negotiation you envision, is that any old form of 10 hypothetical negotiation, including, say, one 11 between a seller with monopoly power and a 12 statutory service? 13 A. I'm not sure what you meant by "any 14 old." 15 Q. Strike "any old." Let me rephrase. 16 Let me rephrase the question. 17 A. Okay. 18 Q. Does the hypothetical negotiation you 19 envision as part of your analytical framework 20 encompass a circumstance in which a seller with 21 monopoly power is engaging in negotiations with a 22 statutory licensee? 23 A. It could. It depends on exactly how 24 one defines "monopoly power." but in my case, the 25 way I would usually define monopoly power, it would</p> |
| 1911 | 1913 |
| <p>1 A. I have it. 2 Q. Is that -- do you have the question in 3 mind? 4 A. Yes. 5 Q. Is that correct? 6 A. Well, you -- you asked me whether I 7 adopted the analytical framework. I described 8 endorsing the analytical framework and then I 9 proceeded to describe it. 10 Q. Yes. 11 And that analytical framework, in your 12 words, consists of approximating a quote, 13 "hypothetical negotiation between a willing buyer 14 and a willing seller for a blanket license for 15 streaming copyrighted musical performances without 16 the possibility of a statutory license alternative 17 to a negotiated license," unquote, correct? That's 18 your words? 19 A. Yes. 20 Q. Okay. And this framework, as you 21 indicate, serves as the basis for what you call 22 your four economic tests; is that correct? 23 A. Yes. 24 Q. And, namely, what you term the willing 25 buyer and willing seller test, correct?</p> | <p>1 still encompass there being substantial competition 2 in the industry. 3 Q. So the answer is "yes"? 4 A. Using my definition of monopoly power, 5 yes. 6 Q. And would your hypothetical negotiation 7 incorporate a negotiation between sellers with what 8 are sometimes called "stacked monopoly power" and a 9 statutory service? 10 A. You're going to have to -- I'm not very 11 comfortable with the phrase "stack monopoly power." 12 You're going to have to define that for me. 13 Q. It's not a term you're familiar with? 14 A. I've heard it before, but it's not a 15 term I would normally use. 16 Q. Whether or not you normally use it, do 17 you have an understanding of what the term is, as 18 you understand it? 19 A. I don't -- I -- I have a sense of what 20 it's about, but I don't have a clear definition. 21 Q. Okay. 22 A. The phrase is not one I ever teach in 23 my course, but I assume you're talking 24 about somehow combining monopoly power of more than 25 one -- the market power of more than one firm. But</p> |

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| 1914 | <p>1 beyond that, I don't know what the term is.</p> <p>2 Q. Would your concept of a hypothetical</p> <p>3 negotiation within the conflation of the Web III</p> <p>4 remand include a negotiation involving a market in</p> <p>5 which the product offerings of the major sellers</p> <p>6 were necessary complements?</p> <p>7 A. I don't know what you mean by</p> <p>8 "necessary complements". It certainly could</p> <p>9 include the possibility of all the products are</p> <p>10 complementary, yes, but by necessary, it doesn't</p> <p>11 ring a bell since it doesn't make sense to me.</p> <p>12 Q. Take a look in your binder, if you</p> <p>13 don't mind, at a tab which should be labeled</p> <p>14 "SoundExchange 1510," which is a copy of the Web</p> <p>15 III remand determination. If you turn to Page 46</p> <p>16 of that decision, please.</p> <p>17 Let me know when you're there. Turn to</p> <p>18 Page 46.</p> <p>19 A. Yes, I'm there now.</p> <p>20 Q. If you focus on the bottom paragraph</p> <p>21 carrying over onto the next page, the judges wrote,</p> <p>22 quote, "As Dr. Ordovery further explained, if the</p> <p>23 repertoires of all four major record companies were</p> <p>24 each required by Webcasters, i.e., if the</p> <p>25 repertoires were necessary complements," that</p> | 1916 | <p>1 the Web III remand determination, is that a</p> <p>2 hypothetical mark -- could that hypothetical</p> <p>3 negotiation involve on the seller's side product</p> <p>4 offerings of the major sellers that were Cournot</p> <p>5 complements, if I'm using that phraseology</p> <p>6 correctly?</p> <p>7 A. So, first of all, just to clarify your</p> <p>8 previous question, the statement that we're talking</p> <p>9 about is a conditional statement. This is -- if</p> <p>10 this is a statement describing Dr. Ordovery's</p> <p>11 testimony, it's not describing the CRB's full</p> <p>12 opinion. It's simply describing a safe and assist</p> <p>13 if the repertoires were required. So I don't hear</p> <p>14 the CRB in this statement just making a judgment</p> <p>15 either way about whether the -- whether the</p> <p>16 repertoires of the four majors are Cournot</p> <p>17 complements.</p> <p>18 Q. I'm not asking you for --</p> <p>19 A. Well, I'm still -- I'm just working my</p> <p>20 way up to your current question.</p> <p>21 Q. Okay. I'm not asking you either about</p> <p>22 what you presume Dr. Ordovery had in mind or for</p> <p>23 purposes of this question even what, in fact, the</p> <p>24 judges had in mind. I'm asking for your</p> <p>25 interpretation, since you're proffering a rate in</p> |
| 1915 | <p>1 italicized in the original, "and Webcasters were</p> <p>2 required to negotiate with each record company</p> <p>3 individually, then each record company would have</p> <p>4 an incentive to charge a monopoly price to maximize</p> <p>5 its profits without concerns of the impact on the</p> <p>6 market at large."</p> <p>7 Do you see that?</p> <p>8 A. I see that.</p> <p>9 Q. Do you have a conception or an</p> <p>10 understanding of what the judges meant by their use</p> <p>11 in that context of "necessary complements"?</p> <p>12 A. Well, they're citing Dr. Ordovery's</p> <p>13 testimony and I'm imagining that by "necessary,"</p> <p>14 they're thinking about must-have products and by</p> <p>15 complements they're thinking about what economists</p> <p>16 call "Cournot complements" through thinking of</p> <p>17 these repertoires of each of the majors as -- as a</p> <p>18 whole as being complements of each other, and that</p> <p>19 leads to certain conclusions one would reach if the</p> <p>20 repertoires were complements and otherwise not</p> <p>21 substitutable.</p> <p>22 Q. Adopting that formulation or assumption</p> <p>23 for purpose of my questioning, does the</p> <p>24 hypothetical negotiation that you envisage to be</p> <p>25 consistent with the framing of the inquiry here in</p> | 1917 | <p>1 this proceeding on behalf of SoundExchange,</p> <p>2 whether, as you write in Paragraph 121 of your</p> <p>3 written direct testimony, that the analytic</p> <p>4 framework consists of approximating, quote, "a</p> <p>5 hypothetical negotiation between a willing buyer</p> <p>6 and a willing seller for a blank license," as you</p> <p>7 set forth, whether that hypothetical negotiation</p> <p>8 could occur consistent with that analytical</p> <p>9 framework with a seller side of the market is</p> <p>10 characterized by the products being necessary for</p> <p>11 Cournot complements?</p> <p>12 A. First of all, I was actually going to</p> <p>13 answer your question --</p> <p>14 Q. Please.</p> <p>15 A. -- but you just cut me off in the</p> <p>16 middle.</p> <p>17 Q. Please.</p> <p>18 A. But I'll try again.</p> <p>19 So I would not charac -- I would</p> <p>20 characterize the four and now three majors as</p> <p>21 complementary and I believe they're must-haves, but</p> <p>22 I would not characterize the framework as fitting</p> <p>23 the traditional Cournot complement, at least basic</p> <p>24 model that economists talk about because I also</p> <p>25 believe that there is -- there is competition that</p> |

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| 1918 | <p>1 arises between the majors when they're negotiating</p> <p>2 contracts. So it's not the simplest Cournot</p> <p>3 complement model that economists work with.</p> <p>4 Q. My question was not whether you</p> <p>5 envision that the marketplace you're examining</p> <p>6 exhibits the characteristics of Cournot</p> <p>7 complements, but on the assumption that it did,</p> <p>8 would the transactions observed in the hypothetical</p> <p>9 marketplace involving sellers of Cournot</p> <p>10 complements with statutory licensees satisfy, in</p> <p>11 your estimation, the requirements for setting a</p> <p>12 reasonable fee between a willing buyer and a</p> <p>13 willing seller in this case?</p> <p>14 A. I still don't believe -- I don't</p> <p>15 believe you fully characterize the nature of the</p> <p>16 competition, so I do believe --</p> <p>17 Q. Sir, I'm not asking you --</p> <p>18 A. Please let me finish.</p> <p>19 Q. -- about the nature of competition.</p> <p>20 I'm asking you to directly answer my question.</p> <p>21 A. I am trying to but you keep</p> <p>22 interrupting me.</p> <p>23 So it is possible that the majors are</p> <p>24 all Cournot complements and I would characterize</p> <p>25 the nature of competition as essential. That's</p> |
| 1919 | <p>1 quite possible, yes. But that wouldn't necessarily</p> <p>2 tell me about whether the simple theorem of that</p> <p>3 Cournot complement is true or not.</p> <p>4 Q. Now, is it accurate that nowhere in</p> <p>5 your written direct testimony do you once mention,</p> <p>6 let alone discuss, that the willing buyer, willing</p> <p>7 seller's standard applicable to this proceeding</p> <p>8 requires approximating rates that would emerge in a</p> <p>9 competitive market. That's true, isn't it?</p> <p>10 A. I don't know whether I talk about it or</p> <p>11 not, but I can tell you that I -- I -- having</p> <p>12 studied this industry prior to --</p> <p>13 MR. RICH: Your Honor, may I get him to</p> <p>14 limit his answers to my questions, please?</p> <p>15 CHIEF JUDGE BARNETT: Yes.</p> <p>16 Dr. Rubinfeld, if you could just answer</p> <p>17 the questions as they are asked.</p> <p>18 THE WITNESS: I'll do my best.</p> <p>19 BY MR. RICH:</p> <p>20 Q. Am I correct that nowhere in your</p> <p>21 written direct testimony --</p> <p>22 A. I remember your question.</p> <p>23 Q. That's a "yes" or "no". What's the</p> <p>24 answer?</p> <p>25 A. The answer is I do not know whether I</p> |
| 1920 | <p>1 used the word "competitive," but I assume that</p> <p>2 there was competition in my report. To tell you</p> <p>3 whether I actually use the word, I'd have to go</p> <p>4 back and look at my report.</p> <p>5 MR. RICH: Your Honor, I move to strike</p> <p>6 the back end where he speculates as to what was or</p> <p>7 wasn't in his testimony.</p> <p>8 CHIEF JUDGE BARNETT: Granted.</p> <p>9 BY MR. RICH:</p> <p>10 Q. And nowhere in your written direct</p> <p>11 testimony you discuss competition between record</p> <p>12 labels have their works performed by Webcasters, do</p> <p>13 you?</p> <p>14 A. I presume that I do, but I -- I can't</p> <p>15 recite to you exact language. Part of my report is</p> <p>16 about what's driving rates in the industry.</p> <p>17 Q. Are you able to point me to any</p> <p>18 passage, single passage in your written direct</p> <p>19 testimony where you discuss competition between and</p> <p>20 among record labels to have their works performed</p> <p>21 by Webcasters?</p> <p>22 A. I have to take a look throughout my</p> <p>23 report.</p> <p>24 Q. While you're looking, when was the last</p> <p>25 time you reviewed this report?</p> |
| 1921 | <p>1 A. Several days ago.</p> <p>2 Q. Okay.</p> <p>3 A. Well, let me cite you to -- just take</p> <p>4 an example. Page 39 of my report where I talk about</p> <p>5 Paragraph 161, "competition among and substitution</p> <p>6 between services having intensified with the</p> <p>7 continued entry of new services and with the</p> <p>8 industry transition from sales and downloads from</p> <p>9 CDs to streaming." And they go on to talk about</p> <p>10 other evolution in the industry, which I think is</p> <p>11 partly related to competition.</p> <p>12 Q. And that's involving competition</p> <p>13 between an among the service -- services in the</p> <p>14 industry, is it not? In the downstream market?</p> <p>15 A. That sentence is about services, yes.</p> <p>16 Q. No. I think the question was whether</p> <p>17 you said a thing about competition in the upstream</p> <p>18 market. I don't believe you found that for me yet.</p> <p>19 A. Give me more time and I'll keep</p> <p>20 looking.</p> <p>21 Q. I can represent to you that we</p> <p>22 certainly haven't found it after reading your</p> <p>23 testimony any number of times.</p> <p>24 Why don't we move on, and if you locate</p> <p>25 it at any point during this testimony, feel free to</p> |

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| <p>1 cite it to the judges.</p> <p>2 A. You're asking me for whether I found</p> <p>3 language that says competition among record labels?</p> <p>4 Q. Not language, whether you discuss the</p> <p>5 concept anywhere in your written direct testimony.</p> <p>6 A. Concepts is implicit in a lot of my</p> <p>7 testimony.</p> <p>8 Q. Implicit.</p> <p>9 You decided not to make it explicit, I</p> <p>10 take it?</p> <p>11 A. I -- when I began my work, I took it</p> <p>12 for granted that there was competition based on</p> <p>13 work I have done in prior work. I worked very</p> <p>14 closely with this industry in the past.</p> <p>15 Q. Now, you did, in fact, determine to</p> <p>16 address the issue of -- strike that.</p> <p>17 You did explicitly discuss the fact</p> <p>18 that the rates setting standard in this proceeding</p> <p>19 entails consideration of a hypothetical marketplace</p> <p>20 in which one observes competition in your rebuttal</p> <p>21 testimony, correct?</p> <p>22 A. That sounds familiar, yes.</p> <p>23 Q. Beginning around Page 26; is that</p> <p>24 right?</p> <p>25 And you can take my word for that.</p> | <p>1 Q. Do you see where I quoted from?</p> <p>2 A. I do.</p> <p>3 Q. I quoted you correctly, correct?</p> <p>4 A. I believe so.</p> <p>5 Q. And you, in fact, determined to address</p> <p>6 these issues, at least explicitly, only after you</p> <p>7 read the written direct testimony of Professor</p> <p>8 Shapiro and Katz; is that correct?</p> <p>9 A. I would say yes, I was stimulated by</p> <p>10 the Katz and Shapiro testimony to elaborate on the</p> <p>11 subject. I have -- didn't in the back of my mind,</p> <p>12 but I didn't -- I think you're correct that this --</p> <p>13 their testimony, which focused heavily on this</p> <p>14 issue, definitely caused me to want to respond.</p> <p>15 Q. And you were elaborating, meaning on</p> <p>16 something that you believe still that you said</p> <p>17 explicitly in your opening?</p> <p>18 A. No, I'm not -- I'm not disagreeing with</p> <p>19 your language contribution. I'm just saying that</p> <p>20 I've always had the idea of competition in my head,</p> <p>21 and I just didn't know that it would become</p> <p>22 debatable in this proceeding.</p> <p>23 Q. Okay. Now, in the same paragraph in</p> <p>24 your written rebuttal testimony, you selectively</p> <p>25 quote from Footnote 37 of the Web III remand</p> |
| 1923 | 1925 |
| <p>1 A. If you say so. I don't know the page</p> <p>2 numbers.</p> <p>3 Q. Okay. And you there state, and you can</p> <p>4 follow me if you would like, but I believe I'm</p> <p>5 quoting you accurately from Paragraph 112 of your</p> <p>6 written rebuttal testimony, quote, "I understand</p> <p>7 that the willing seller, willing buyer standard</p> <p>8 falls for rates that would have been set in a</p> <p>9 competitive marketplace." unquote.</p> <p>10 MR. POMERANTZ: Your Honor, Mr. Rich is</p> <p>11 now working off of his rebuttal testimony. I</p> <p>12 actually don't object as long as I'm not precluded</p> <p>13 from coming back to this when they offer their</p> <p>14 direct testimony. I just want to make sure the</p> <p>15 rules are clear because we did also address this --</p> <p>16 both parties addressed this a lot, but I don't want</p> <p>17 to be -- I don't want to waive our right to come</p> <p>18 back and -- and address whatever Professor Shapiro,</p> <p>19 Katz, or Fischel say in their direct testimony.</p> <p>20 MR. RICH: We certainly have no issue</p> <p>21 with that, Your Honor.</p> <p>22 CHIEF JUDGE BARNETT: Okay. Thank you.</p> <p>23 MR. POMERANTZ: Thank you.</p> <p>24 MR. RICH: This is central to the case.</p> <p>25 BY MR. RICH:</p> | <p>1 determination; is that correct?</p> <p>2 A. Can you tell me where you are, sir?</p> <p>3 Q. Yes.</p> <p>4 I am in Paragraph 112 at Page 26 of</p> <p>5 your written rebuttal testimony where you begin in</p> <p>6 the Web III remand decision of the judges.</p> <p>7 Do you see that?</p> <p>8 A. I do.</p> <p>9 Q. That was a selective quotation from</p> <p>10 Footnote 37, was it not?</p> <p>11 A. Oh, I see. Yes. Yes, it was from</p> <p>12 Footnote 37. I was having trouble locating it.</p> <p>13 Again, I see it now.</p> <p>14 Q. And I take it you recall from your</p> <p>15 recent deposition that we discussed the fact that</p> <p>16 you omitted via ellipses from that paragraph the</p> <p>17 judge's approval of the notion that the marketplace</p> <p>18 we are trying to approximate here is, and quote,</p> <p>19 "effectively competitive," unquote one; is that</p> <p>20 correct?</p> <p>21 A. I believe the judges did say that, yes.</p> <p>22 Q. And you omitted that in favor of</p> <p>23 extracting from that footnote what you term, quote,</p> <p>24 "the critical question," end quote, open quote,</p> <p>25 "whether the evidence demonstrates that sufficient</p> |

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| 1926 | <p>1 competitive factors existed to permit agreements to</p> <p>2 serve as useful benchmarks and does not demonstrate</p> <p>3 that rates in the agreements," quote,</p> <p>4 "approximating monopoly rates," unquote, close</p> <p>5 quotes; is that correct?</p> <p>6 A. You're still ahead of me. I'm just</p> <p>7 trying to locate.</p> <p>8 Q. Take your time.</p> <p>9 A. Well, just tell me where it's -- to</p> <p>10 save time, tell me where you're quoting from.</p> <p>11 Q. I'm still quoting from that same</p> <p>12 paragraph. That was at the very end of Paragraph</p> <p>13 112, when you talk about the critical question --</p> <p>14 A. I see it now. Thank you, Counsel.</p> <p>15 So yes, this is what I included in the</p> <p>16 paragraph.</p> <p>17 Q. And your reason for failing to cite to</p> <p>18 the judges Footnote 37 endorsement of a normative</p> <p>19 marketplace characterized by, quote, "effective</p> <p>20 competition," I take it, was simply in the interest</p> <p>21 of writing a shorter paragraph?</p> <p>22 A. So you're asking me what I recall from</p> <p>23 what I said in my deposition?</p> <p>24 Q. I'm just asking you what is accurate.</p> <p>25 A. I don't have a clear recollection of</p> | 1928 | <p>1 why I didn't refer to the word "effectively," but</p> <p>2 that's what you emphasized in your question.</p> <p>3 No. I indicated that the original -- I</p> <p>4 emphasized the word "effectively". My question is:</p> <p>5 Why you left out that statement appearing in Note</p> <p>6 37.</p> <p>7 No particular reason, except I was</p> <p>8 trying to write a shorter paragraph and I didn't</p> <p>9 want to cite the entire footnote."</p> <p>10 (Tape over.)</p> <p>11 Q. That is an accurate capturing of your</p> <p>12 testimony at the deposition, correct?</p> <p>13 A. Yes, it is.</p> <p>14 Q. By the way, where in Footnote 37 do the</p> <p>15 judges indicate that the passage you quote from in</p> <p>16 your Paragraph 112 poses, quote, "the critical</p> <p>17 question," end quote, in this proceeding?</p> <p>18 A. I'm not sure the judges -- I don't</p> <p>19 recall. This is my interpretation. I can't say</p> <p>20 the judges use that word.</p> <p>21 Q. Now, to clarify, for purposes of our</p> <p>22 ongoing examination, am I correct, sir, that at the</p> <p>23 time you submitted your written direct testimony,</p> <p>24 you were unaware that our client, Pandora, had</p> <p>25 entered into a direct license agreement with Merlin</p> |
| 1927 | <p>1 what I was thinking at the time. I presume I</p> <p>2 didn't think it was necessary to develop the point</p> <p>3 I was making. I wasn't trying to avoid that point.</p> <p>4 I don't have a clear recollection of exactly what I</p> <p>5 was thinking at the time.</p> <p>6 Q. Let me queue up a passage from your</p> <p>7 recent April 13th deposition to see if it jogs your</p> <p>8 recollection.</p> <p>9 A. Sure.</p> <p>10 (Video played.)</p> <p>11 "And what follows in the delighted</p> <p>12 language in Footnote 37, free to follow along is a</p> <p>13 citation which says, "See also Web II," with the</p> <p>14 proper citation to it, "parenthetical explaining</p> <p>15 that Web I required," and quote, "effectively,"</p> <p>16 which is italicized in the original, "competitive</p> <p>17 market," unquote, rather than a quote, italicized,</p> <p>18 "perfectly competitive market," unquote?</p> <p>19 Do you see that?</p> <p>20 Yes.</p> <p>21 Why did you leave that out?</p> <p>22 I was looking throughout this paragraph</p> <p>23 to find ways to shorten it to just avoid having a</p> <p>24 longer more complex report. I can't think of any</p> <p>25 special reason. I gather you're asking me about</p> | 1929 | <p>1 and a number of Merlin's members? You were unaware</p> <p>2 at the time, yes?</p> <p>3 A. That's correct.</p> <p>4 Q. Okay.</p> <p>5 A. I didn't -- did not find out until I</p> <p>6 saw Dr. Shapiro's report.</p> <p>7 Q. Okay. And so, accordingly, in your</p> <p>8 written direct testimony, you did not undertake any</p> <p>9 evaluation of that Merlin agreement as a potential</p> <p>10 benchmark for rate setting here, correct?</p> <p>11 A. That's correct.</p> <p>12 Q. And nor did you compare the attributes</p> <p>13 of that benchmark to your interactive services</p> <p>14 benchmark, also correct?</p> <p>15 A. Yes. At the time I wrote my direct</p> <p>16 report, that is correct.</p> <p>17 Q. Right.</p> <p>18 These questions are all focused on, for</p> <p>19 the moment, your direct test -- written direct</p> <p>20 testimony.</p> <p>21 Nor did you apply your four-factor test</p> <p>22 to the Merlin agreement in connection with your</p> <p>23 written direct testimony, right?</p> <p>24 A. That's correct.</p> <p>25 Q. Nor did you discuss your shadow of the</p> |

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| 1930 | <p>1 statutory license analysis in the context of the</p> <p>2 Merlin agreement, right?</p> <p>3 A. That's correct.</p> <p>4 Q. Okay. And so these are all topics</p> <p>5 covered in your subsequent rebuttal testimony.</p> <p>6 correct?</p> <p>7 A. Yes.</p> <p>8 Q. To which we will return at a later</p> <p>9 date.</p> <p>10 A. I look forward to it.</p> <p>11 Q. Now, I take it, it remains your view</p> <p>12 that the agreements between recording companies and</p> <p>13 major interactive services are the most informative</p> <p>14 benchmarks for rate setting in this case, correct?</p> <p>15 A. Yes.</p> <p>16 Q. And that's because these agreements</p> <p>17 earned, quote, "the best scores," unquote, on your</p> <p>18 four economic tests, at least as of the time of</p> <p>19 your written direct testimony; is that correct?</p> <p>20 A. That's certainly one of the reasons.</p> <p>21 yes.</p> <p>22 Q. Okay. But nothing in your application</p> <p>23 of those four economic tests assesses whether or to</p> <p>24 what degree the agreements relied on between these</p> <p>25 interactive services and recording companies when</p> | 1932 | <p>1 so I take it your question is did I -- has to be</p> <p>2 more specific. Did I explicitly think about how</p> <p>3 steering would impact my opinions, I guess is your</p> <p>4 question, and I don't recall focusing on steering.</p> <p>5 I think that would be fair, but I certainly was</p> <p>6 aware of steering.</p> <p>7 JUDGE STRICKLER: Professor, you said</p> <p>8 you were aware of steering prior to your</p> <p>9 involvement in this case. Can you give us a</p> <p>10 definition of steering as you understand it?</p> <p>11 MR. RICH: You anticipated my next</p> <p>12 question.</p> <p>13 JUDGE STRICKLER: Skip to the next one.</p> <p>14 MR. RICH: Okay.</p> <p>15 THE WITNESS: Yes. Steering involves</p> <p>16 making some effort to move customers to -- to play</p> <p>17 more of songs that you have some preference for and</p> <p>18 less of others. It's affecting the choices they</p> <p>19 make within the confines of your particular</p> <p>20 repertoire.</p> <p>21 JUDGE STRICKLER: You said you were</p> <p>22 aware of the concept of steering before this</p> <p>23 proceeding.</p> <p>24 Is there a more general definition of</p> <p>25 steering that applies not just to playing the</p> |
| 1931 | <p>1 negotiated in a competitive market, correct? You</p> <p>2 just don't undertake that analysis?</p> <p>3 A. As I have suggested sometime several</p> <p>4 times before, it's -- it was -- at the time, it was</p> <p>5 my belief that the market was competitive and that</p> <p>6 was presumption I used when I was doing the</p> <p>7 analysis. I just didn't explicitly say that.</p> <p>8 Q. So there's nothing, though, in the --</p> <p>9 in the text of your written direct testimony</p> <p>10 assessing whether there is competition between</p> <p>11 record labels in the upstream market in which the</p> <p>12 record labels license their sound recordings to</p> <p>13 interactive services, correct? It's just not</p> <p>14 something you analyze, correct?</p> <p>15 A. In that report, I did not explicitly</p> <p>16 talk about that nature of the competition. To the</p> <p>17 extent that I recall, there may be other language</p> <p>18 in here that I haven't searched. I would have to</p> <p>19 take more time out to do that.</p> <p>20 Q. So you didn't -- you didn't, for</p> <p>21 example, consider the concept of steering when you</p> <p>22 submitted your written direct testimony, correct?</p> <p>23 A. Well, it's hard to answer. I'm</p> <p>24 certainly aware of the concept of steering ever</p> <p>25 since I began working on this case and prior to it,</p> | 1933 | <p>1 music, but in economics at large?</p> <p>2 THE WITNESS: I don't know that I have</p> <p>3 seen it in standard textbooks, but yeah, one can</p> <p>4 imagine steering being applied in a much broader</p> <p>5 concept. It's the process of directing people to</p> <p>6 make choices beyond what they would make if you</p> <p>7 were not using some mechanism to direct them. But</p> <p>8 I don't -- it's not a term that you would see in my</p> <p>9 textbook, for example.</p> <p>10 JUDGE STRICKLER: It's directing</p> <p>11 behavior by offering incentives or penalties?</p> <p>12 THE WITNESS: Yeah.</p> <p>13 The reason why -- yes, but the reason</p> <p>14 why I don't think you would see a definition is</p> <p>15 because we use market incentives all the time or</p> <p>16 pricing incentives to direct people, and I don't</p> <p>17 think most economists would call that steering. So</p> <p>18 steering -- although it is, the steering usually --</p> <p>19 I think people would want something more specific.</p> <p>20 So here, the steering is not done through change in</p> <p>21 prices or anything. It's done by changing the</p> <p>22 choices the people -- the options that people have.</p> <p>23 JUDGE STRICKLER: Thank you.</p> <p>24 THE WITNESS: I don't know -- I don't</p> <p>25 know -- I haven't seen the textbook definition of</p> |

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| 1934 | <p>1 steering, but I feel comfortable using the term.</p> <p>2 BY MR. RICH:</p> <p>3 Q. Now, in your recent deposition, we</p> <p>4 talked a bit about that, and I think you</p> <p>5 acknowledge that one conception of steering would</p> <p>6 be steering to gain market share by a seller in a</p> <p>7 market, correct?</p> <p>8 A. That might be one reason one enables</p> <p>9 steering, yes.</p> <p>10 Q. Yes.</p> <p>11 And -- and let me ask you this</p> <p>12 question: On your direct examination earlier, you</p> <p>13 discussed the fact or the opinion that the majors</p> <p>14 are must-haves, as that expression has been used,</p> <p>15 in your view, both in the interactive service and</p> <p>16 the noninteractive service market, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And by must-have, am I correct in</p> <p>19 interpreting your sense of that term to mean that</p> <p>20 no major could be dropped altogether by either an</p> <p>21 interactive service or a service like Pandora?</p> <p>22 A. Yeah, I had to -- that's generally</p> <p>23 correct. I had a small exception, which I put in</p> <p>24 just to clarify. It's conceivable to me that I --</p> <p>25 that a service like Amazon might avoid deals with</p> | 1936 |
| 1935 | <p>1 all the majors because music streaming might be</p> <p>2 such a small portion of their business model that</p> <p>3 they could do without all the majors: otherwise. I</p> <p>4 would say -- I would say must-have is a term I'm</p> <p>5 very comfortable with.</p> <p>6 Q. Right.</p> <p>7 But staying with my definition of</p> <p>8 steering as steering to increase market share, for</p> <p>9 purposes of my next question, would you agree with</p> <p>10 me that two concepts are not incompatible for any</p> <p>11 given service; meaning, that you could conceivably</p> <p>12 have a service as to which each major is a</p> <p>13 must-have, but depending on the music used</p> <p>14 characteristics and abilities of that service, that</p> <p>15 service might, nonetheless, be in a position to</p> <p>16 steer its music use, favoring with greater plays,</p> <p>17 and therefore, awarding greater market share to one</p> <p>18 or more of the majors? They're not incompatible,</p> <p>19 are they?</p> <p>20 A. I believe it's not incompatible for one</p> <p>21 service to steer in the world of statutory licenses</p> <p>22 for noninteractives. I don't believe it's possible</p> <p>23 for all the majors to steer at the same time.</p> <p>24 Q. But if by steering to gain -- by</p> <p>25 steering to gain market share, you would agree with</p> | 1937 |

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| 1938 | <p>1 your judgment as to the degree of competition</p> <p>2 between or among major labels for plays on</p> <p>3 interactive services; isn't that correct?</p> <p>4 MR. POMERANTZ: Objection, Your Honor.</p> <p>5 We had a rule in this case, I think all</p> <p>6 parties abided by, that if the experts spoke to the</p> <p>7 client and did not rely on it, it would not be</p> <p>8 discoverable or testified about, and I believe that</p> <p>9 was the rule followed in all depositions in this</p> <p>10 case. Sounds to me like Mr. Rich is asking for</p> <p>11 communications that were not discoverable in this</p> <p>12 matter and not -- and something that we all agreed</p> <p>13 would not be questioned about.</p> <p>14 MR. RICH: If I may be heard, Your</p> <p>15 Honor, it's exactly the opposite. I'm preserving</p> <p>16 that. I'm merely confirming what this witness</p> <p>17 previously confirmed in a deposition, which is that</p> <p>18 nothing contained in his written direct testimony</p> <p>19 reflected the substance of any of those meeting,</p> <p>20 and I'm just trying to confirm that.</p> <p>21 MR. POMERANTZ: Well, that's fine, but</p> <p>22 that's what he's trying to confirm. But he stuck</p> <p>23 the word "competition" in there and was trying to</p> <p>24 get into the substance. If he just wants to ask</p> <p>25 that question, I have no objection.</p> | 1940 |
| 1939 | <p>1 CHIEF JUDGE BARNETT: Could you ask</p> <p>2 that question, Mr. Rich?</p> <p>3 MR. RICH: Yes.</p> <p>4 BY MR. RICH:</p> <p>5 Q. So am I correct, sir, that you</p> <p>6 confirmed in an earlier deposition in this</p> <p>7 proceeding that nothing contained in your written</p> <p>8 direct testimony reflects the fruits of any of</p> <p>9 those early conversations you had with any Pandora</p> <p>10 representatives?</p> <p>11 A. You are correct.</p> <p>12 Q. Okay. Now, your testimony at this</p> <p>13 hearing, at this trial from the chosen</p> <p>14 representatives of the majors reveals that none</p> <p>15 competes with the others to secure a greater share</p> <p>16 of performances on interactive services, I take it</p> <p>17 that you would have no reason to question that</p> <p>18 testimony, correct?</p> <p>19 MR. POMERANTZ: Your Honor, objection</p> <p>20 to the extent it assumes testimony that, as I read</p> <p>21 the question, is not in evidence.</p> <p>22 CHIEF JUDGE BARNETT: Overruled.</p> <p>23 You may answer.</p> <p>24 BY MR. RICH:</p> <p>25 Q. You can answer.</p> | 1941 |

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| 1942 | <div>1 Do you see that?</div> <div>2 MR. POMERANTZ: Your Honor, if I could</div> <div>3 have the entire answer read and not just the one</div> <div>4 that says, "yes." The answer continues on Line 25</div> <div>5 and onto the top of Page 367, I think.</div> <div>6 MR. RICH: I'm happy to complete it.</div> <div>7 It was not intentional.</div> <div>8 BY MR. RICH:</div> <div>9 Q. The answer continues after Mr.</div> <div>10 Pomerantz's objection to form: "I don't think" --</div> <div>11 "I don't think you can have. The statutory license</div> <div>12 doesn't have anything that I recall payment in</div> <div>13 it."</div> <div>14 Is that your testimony?</div> <div>15 A. Yes.</div> <div>16 Q. Okay. Now, Mr. Pomerantz examined you</div> <div>17 on some activities you undertook in the 2012 period</div> <div>18 in relation to the proposed merger or the proposed</div> <div>19 acquisition by Universal Music Group of the EMI</div> <div>20 music group's recorded business.</div> <div>21 Do you recall that?</div> <div>22 A. I do.</div> <div>23 Q. Am I correct that at least for a time</div> <div>24 you consulted with both Universal and EMI in</div> <div>25 relation to that transaction?</div> | 1944 | <div>1 CERTIFICATE OF COURT REPORTER</div> <div>2</div> <div>3 I, Bonnie L. Russo, do hereby certify that the</div> <div>4 foregoing transcript is a true record of the</div> <div>5 proceedings to the best of my ability, that I am</div> <div>6 not related to or employed by any of the parties</div> <div>7 involved in these proceedings, and, further, that I</div> <div>8 am not a relative or employee of any attorney or</div> <div>9 counsel employed by the parties hereto, or</div> <div>10 financially interested in the proceedings.</div> <div>11</div> <div>12</div> <div>13 <div>Bonnie Russo</div></div> <div>14</div> <div>15 My Commission Expires:</div> <div>16 May 16, 2016</div> <div>17</div> <div>18</div> <div>19</div> <div>20</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div> |
| 1943 | <div>1 A. You are correct.</div> <div>2 Q. Okay. And, approximately, when did</div> <div>3 that retention begin, do you recall?</div> <div>4 A. It would have been sometime in 2011. I</div> <div>5 don't recall the exact month.</div> <div>6 Q. Okay.</div> <div>7 MR. RICH: Reluctantly, Your Honors, I</div> <div>8 think this segment will move into some restricted</div> <div>9 material and I will have it in one segment, and</div> <div>10 then hopefully we can reopen the hearing.</div> <div>11 CHIEF JUDGE BARNETT: Your timing is</div> <div>12 perfect because I was just going to say let's take</div> <div>13 the other ten minutes of our afternoon recess and</div> <div>14 see if we can get some air in here.</div> <div>15 We'll be in recess for ten minutes.</div> <div>16 (A short recess was taken.)</div> <div>17 CHIEF JUDGE BARNETT: Please be</div> <div>18 seated. We did ask for air. We hope we get it.</div> <div>19 Mr. Rich, at this point, we are going</div> <div>20 to close the hearing room. If you have not signed</div> <div>21 the nondisclosure certificate, then please wait</div> <div>22 outside. It looks like everybody here is in for</div> <div>23 the long haul.</div> <div>24 (THIS ENDS PUBLIC SESSION)</div> <div>25 (RESTRICTED SESSION BOUND SEPARATELY)</div> | | |

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